86-573

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as **KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **et. al.**,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

PETITION OF THAN TUN, M.D., and THIDA SWE TUN FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a doctor whose hospital staff privileges have been either reduced, suspended or terminated by the peer review committees must first exhaust the hospital review process before seeking tort and contract damages against the hospital and peer review personnel on various theories of recovery, including civil rights and anti-trust violations.

2. Whether **HRS §663-1.7** immunizes the hospitals and their respective peer review personnel from liability to the petitioning doctor, where one group falsely accuses the doctor of incompetence and the other hospital acts upon the false report without independently ascertaining the truth of the report.

RESPONDENT PARTIES

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as **KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **KAPIOLANI WOMEN AND CHILDREN'S CENTER**; **RICHARD DAVI**, Individually and as president of Kapiolani Women And Children's Center; **PAUL E. COOK**, Individually and as Executive Vice-president of Kapiolani Women And Children's Center; **WALTER K. T. SHIM, M.D.**, Individually and as Chief of Staff of Kapiolani Women and Children's Center; **STANLEY M. K. CHUNG, M.D.**, Individually and as Chief of Surgery of Kapiolani Women And Children's Center; **THE QUEEN'S MEDICAL CENTER**, a Hawaii nonprofit corporation; **JON PEGG, M.D.**, Individually and as Chairman of Anesthesiology Credentials

Committee, The Queen's Medical Center; **DAN YOSHIOKA, M.D.**, Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and **ARTHUR SPRAGUE, M.D.**, Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; **JOHN DOES 1-50; JANE DOES 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50**; and **DOE GOVERNMENTAL UNITS 1-50.**

MITSUO HATTORI, M.D. was originally a party Defendant, but is not a Respondent here because the Hawaii Supreme Court correctly reversed and remanded for further proceedings as against him.

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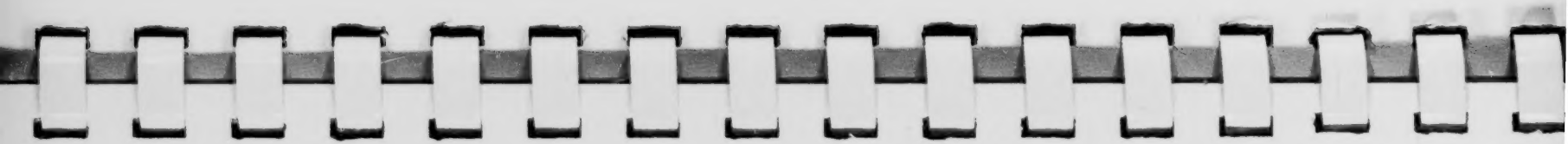

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HAWAII SUPREME COURT OPINION

The unpublished memorandum opinion, **TUN vs. KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.** is included in the Appendix, (App. 1 - 15).

SUPREME COURT JURISDICTION

The Opinion of the Supreme Court of the State of Hawaii was entered on June 17, 1986. A timely Motion for Reconsideration was denied without argument on July 7, 1986. The Judgment on Appeal of the Supreme Court of the State of Hawaii was entered on August 19, 1986. The jurisdiction of the Court is invoked under **28 U.S.C. §1257(3).**

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Revised Statutes, §663-1.7:
(See Appendix 25 - 28)

United States Code, title 42, §1983:
(See Appendix 29)

Hawaii Rules of Civil Procedure, Rule 56:
(See Appendix 30 - 33)

STATEMENT OF THE CASE

The Pleadings and Proceedings

On August 13, 1984, the Petitioners, hereinafter referred to as "Tun", filed their Complaint in the Circuit Court of the First Circuit against numerous defendants, of which the Defendants Kauikeolani Children's Hospital, Kapiolani Women and Children's Medical Center, Kapiolani Women and Children's Center, hereinafter referred to as Kapiolani, Richard Davi, Paul E. Cook, Walter K. T. Shim, Stanley M. K. Chung and Mitsuo Hattori were joined as Defendants (R 1-24). [R refers to Record on Appeal at the designated page, to be certified by the Clerk of the Hawaii Supreme Court.] Other defendants were Queen's Medical Center (Queen's), Doctors Jon Pegg, Dan Yoshioka and Arthur Sprague. Then on August 22, 1984, the First Amended Complaint for

Damages was filed (R 25-48), which is summarized as follows. Dr. Tun contends that all Defendants acted jointly and severally in causing his damages arising out of an occurrence date on or about October 20, 1982, in which Tun's medical privileges were reduced at Queen's as a result of derogatory information received from Dr. Hattori on that date. All counts of the Amended Complaint seek substantial monetary damages on multiple legal theories, generally summarized as defamation, infliction of emotional distress, interference with business relations, conspiracy to violate Federal and State antitrust laws, abuse of process, deprivation of due process and civil rights in violation of **42 U.S.C. §1983**, plus breach of contract.

Petitioners sought a jury trial for substantial general, special and punitive

damages plus injunctive relief from the wrongs suffered, together with attorney's fees and costs (R 45-46).

Paragraph 25 of the Amended Complaint alleges that Dr. Hattori told Dr. Tun he would never obtain privileges as a result of Hattori's opposition; thus Dr. Tun believed it was futile to proceed with his application at Kapiolani (R 33).

Malice of the Respondents was alleged in Paragraph 78 of the amended complaint (R 45).

To this Amended Complaint, Respondents Kapiolani, Davi and Cook separately answered (R122-126). Drs. Shim and Chung also separately answered (R 151-155). Both answers are basically identical raising numerous factual and legal defenses of contributory negligence, assumption of risk, privilege and immunity, failure to mitigate damages,

failure to exhaust adminsitrative remedies, truth, and statute of limitations.

Both answers, including Dr. Hattori's answer, deny Paragraph 25 of the Amended Complaint because they are without sufficient information to either admit or deny Paragrah 25 (R 61, 125, 153).

The Queen's Case:

To the Amended Complaint, the Respondents Queen's, Pegg, Yoshioka and Sprague moved for a Dismissal for failure to state a claim upon which relief can be granted under **Rule 12(b)(1)** and **(6)** of the **Hawaii Rules of Civil Procedure (HRCP)**, because Plaintiff Tun failed to exhaust his administrative remedies and that the Defendants further were immune from civil liability by virtue of **HRS §663-1.7** because Drs. Pegg, Yoshioka and Sprague

are members of a Peer Review Committee at Queen's (R 71-121).

Honorable Frank T. Takao, the Court, considering affidavits in support of and in opposition, granted the motion dismissing the Complaint with prejudice, because the Petitioners had not exhausted their administrative remedies. This was in essence granting a summary judgment motion as per **Rule 12(b)(6), Hawaii Rules of Civil Procedure.**

The Kapiolani Case:

On January 8, 1985, Kapiolani, Davi, Cook, Shim and Chung filed their Motion for Summary Judgment (R 184-314), which was joined by Dr. Hattori on January 21, 1985 (R 315-334). Their respective motions and memoranda were amended (R 350-359) and supplemented (R 361-372), and those matters finally came on for hearing before the Honorable Edwin H. Honda on

February 19, 1985, at which time the Court granted the Motions for Summary Judgment "as to both the hospital and its related auxiliary personnel or the staff personnel, as well as Dr. Hattori" (T 22). T refers to the Transcript, and page from the February 19, 1985, hearing.] At that time the Court reasoned that "The Court may question a little bit about some of the procedures, but I think that eventually, your client, if nothing else, has seen fit not to pursue his administrative remedies; I don't think that under the facts of the case, that you can say that appeal would have been precluded." (T 22-23).

Accordingly, the Court entered judgment granting the Motions for Summary Judgment for Kapiolani, Messrs. Davi, Cook and Drs. Shimm and Chung, and Dr. Hattori (2R 13-17).

Tuns timely appealed to the Hawaii Supreme Court from that final judgment. The Memorandum Opinion decided the exhaustion and immunity issues adverse to Petitioners, except they reversed and remanded the case as to Dr. Hattori (App. 1 - 15).

The Evidence

Stating the evidence and inferences reasonably drawn therefrom in the light most favorable to the Tuns, the following facts were before the trial court and the Hawaii Supreme Court on the Motions for Summary Judgment.

The Queen's Case:

As per affidavits of Drs. Bolian and Pegg, the Queen's version of the facts is stated chronoligically. On June 17, 1982, Dr. Tun applied for privileges in anesthesiology at Queen's. In so doing, Tun agreed to abide by the constitution

and bylaws and the policies of Queen's and acknowledged receipt of a copy of the constitution and bylaws (R 89). On June 18, 1982, Tun was granted temporary clinical privileges in anesthesiology with observation, which does not confer staff membership designation as per the bylaws. Tun was further granted a temporary privilege without observation on July 12, 1982, effective until August 10, 1982, pending further receipt of references and; accordingly, his temporary privileges were extended in thirty-day increments through November 1, 1982 (R 90).

As part of the Queen's review process, information was received as per Tun's release authorization concerning Dr. Tun's history of hospital privileges in July - October, 1977. As a result, on October 22, 1982, in response to the questionnaire, Kapiolani indicated that

Dr. Tun had not satisfactorily completed his observation and probation requirements, with a statement indicating that Dr. Tun was not "ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology" (R 91-92). Following that, on October 29, 1982, Tun's temporary clinical privileges were granted at Queen's to handle adult cases without observation and anesthesiology for newborn and pediatric cases, with observation (R 92). This status continued through May 1, 1983 (R 93).

On April 4, 1983, Tun was advised that his application for anesthesiology credentials would be approved on adult cases, without observation, and on pediatric cases under age 10 with observation for a minimum of two cases at Queen's involving the use of the general

inhalation anesthetic technique (R 93). After being advised of his right to an informal hearing concerning the restriction on his privileges, on October 4, 1983, he met with the Credentials Committee to clarify the matters at question, and the Committee recommended that his application for privileges be denied (R 94). On February 2, 1984, the Medical Executive Committee reviewing Dr. Tun's application for privileges accepted the recommendation of the Credentials Committee that his application be denied (R 94).

On February 21, 1984, Tun was advised of his right to an informal hearing concerning the denial of his application, which hearing was finally scheduled on October 30, 1984 (R 95). The affidavit further stated that his membership and clinical privileges at Queen's "has not

been completed" and that "Dr. T. Tun's application for staff privileges is incomplete" (R 95-96).

Dr. Jon Pegg (R 116-118) generally says that all the actions taken by the Committee and by himself were done in good faith and without malice or ill will. He further states that the decisions of that Committee were based upon the "independent medical and ethical judgments made in the best interests of patient care according to professional standards" (R 118).

The affidavit of Dr. Than Tun (R 143-146) in opposition to the Motion to Dismiss provides that he is a physician licensed to practice medicine in the State of Hawaii and is Chief of Anesthesiology at Wahiawa General Hospital. On June 15, 1982, he applied for clinical privileges in anesthesiology at Queen's and was granted temporary clinical privileges with

observation on June 18, 1982, and without observation on July 12, 1982, through November 1, 1982. On October 29, 1982, his privileges were reduced for newborn and pediatric cases requiring observation, which reduction was without written charges and without any hearing prior to reduction of his privileges (R 144). This reduction of privileges for newborns and pediatric cases requiring observation was based on a response from Kapiolani. The action reducing his Queen's privileges was taken without any investigation on the part of Queen's and contrary to the provisions of **HRS §663-7.1** (sic) (R 144).

The Tun affidavit further states the reduction of privileges by Queen's violated **HRS §663-7.1** (sic), in that the Board of Medical Examiners were not notified that his privileges had been reduced (R 144).

On October 4, 1983, he met with the Anesthesiology Credentials Committee and was questioned about an apparent discrepancy in his answer to one of his questions regarding whether he had his privileges suspended, restricted, revoked, or denied at Kapiolani, and his response was that he had withdrawn his application for privileges at Kapiolani on August 13, 1982; hence, as of September 29, 1984, his privileges were not so restricted. Following that, the Credentials Committee offered him limited privileges if he would state that he answered the questionnaire as he did because he misunderstood the question. This he refused to do. Whereupon, the Credentials Committee recommended that his privileges be denied on November 2, 1983, which was accepted by the Medical Executive Committee on February 2, 1984 (R 145).

As a result of the foregoing, Queen's acted in such a manner that it left no doubt that to continue with their administrative procedures would be futile. He said that Queen's reduction of his privileges without investigation constitutes malice on the part of Queen's and Drs. Pegg, Yoshioka and Sprague and that his only recourse against them was to file suit (R 145). All of this caused him great financial loss, loss of reputation, emotional stress and strain to him and his family (R 146).

Queen's Hospital admitted to receiving construction funds under the Hill-Burton Act and has received both Federal and State funds under Medicare/Medicade programs. Moreover, it is a nonprofit hospital, exempt from certain Federal and State taxation and is

further affiliated with the University of Hawaii Medical School (R 88).

None of the affidvits by any of the peer-review personnel established any independent investigation by any of them or any hosital group to determine from the charts and other medical evidence at Kapiolani whether, in fact, the patient upon which Dr. Tun was administering anesthesia ever suffered a cardiac arrest. All affidavits clearly indicate they were relying upon whatever Dr. Hattori told them. Dr. Tun's affidavits clearly refute the Dr. Hattori version of what happened to the patients on July 7, 1982.

The Kapiolani Case:

Dr. Tun has been a physician for many years, having performed over 5,000 anesthesia cases since 1977, including hundreds of pediatric cases and presently is Chief of Anesthesiology at Wahiawa

General Hospital. On June 23, 1982, he was granted temporary privileges for anesthesiology at Kapiolani and was observed in the operating room. Dr. Hattori observed him on July 3, 1982 and stated in a report that it was difficult to judge his performance from a short procedure; however, on July 7, 1982, another surgeon, Dr. Tan, during the course of performing a meatotomy, reported that "the patient tolerated the procedure well and left the operating room in satisfactory condition". For the same operation, Dr. Hattori reported that the patient had a "mild laryngospasm and bradycardia". Dr. Hattori's report was false, since the heart rate was 82 and bradycardia occurs when the rate is 60 or below and there was no laryngospasm. Dr. Hattori also reported in that surgery that "there was poor preparation. No muscle

relaxant or atropine prepared in syringes". These statements were also false. In that surgery, Dr. Hattori was upset because Dr. Tun was late due to an emergency surgery at Queen's (R 345).

In a second operation observed by Dr. Hattori on July 7, 1982, the surgery was cancelled because Dr. Hattori improperly diagnosed a cardiac arrest and initiated CPR unnecessarily because Dr. Hattori never checked the pulse of the patient when, in fact, there was a pulse. As such, it is a medical impossibility to have a cardiac arrest when the patient has a pulse. All the medical facts from that surgery deny the possibility of a cardiac arrest. Consequently, Dr. Hattori's observation report was totally false when he reported a cardiac arrest. Dr. Hattori's actions placed the patient in a life-threatening situation in attempting

to administer CPR to a patient that had a pulse (R 346).

As a result of what occurred on July 7, 1982 concerning Dr. Hattori's false reports, Dr. Tun determined that he could never successfully work at any hospital where Dr. Hattori was Chief of Anesthesiology. Further, as a result of the false reporting by Dr. Hattori, Dr. Tun's privileges at Kapiolani Hospital were summarily suspended; however, Dr. Tun chose to withdraw his application for privileges rather than go through the appellate procedure, since he felt it would be futile inasmuch as Dr. Hattori was falsely accusing Dr. Tun of malpractice. Dr. Tun felt that the power structure at the hospital would side with Dr. Hattori and that it would be futile to proceed any further at that hospital (R 346-347).

All of the actions taken by Dr. Chung, Dr. Shim and Mr. Cook and Mr. Davi are based upon the false report of Dr. Hattori without any investigation on their own into the truth of such reports, since none of those men asked him for his version of what happened before he was summarily suspended and his privileges revoked.

As a result of the foregoing, Dr. Tun's privileges at Queens were revoked when Dr. Hattori informed them falsely that Dr. Tun was not qualified to do pediatric cases unless he received further training elsewhere. This caused severe economic hardship to the Plaintiff, causing him to file a petition for bankruptcy, all to his damage (R 347).

In support of their Motion for Summary Judgment, Defendants Kapiolani,

Drs. Shim and Chung and Messrs. Davi and Cook offered the following evidence.

Dr. Tun was granted temporary privileges at Kapiolani on June 23, 1982, except that "newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas" (R 287-289). July 7, 1982 observation by Dr. Hattori showed that the surgery was cancelled because of a cardiac arrest. Dr. Hattori initiated CPR immediately when he observed that the patient was cyanotic and ventricular fibrillation occurred. Dr. Hattori stated that the pupils were dilated after successful defibrillation and reacted to light sluggishly. Accordingly, Dr. Hattori stated: "I don't think that he should be doing any pediatric cases in

this hospital unless he seeks further training elsewhere." (R 290).

Apparently upon receipt of the report from Dr. Hattori, Dr. Tun's temporary privileges were terminated immediately on July 9, 1982 in view of two unacceptable anesthetic cases performed at Kapiolani (R 291). On July 9, 1982, Dr. Chung reported the observation by Dr. Hattori to Mr. Davi as president of Kapiolani (R 292). His recommendation was that Dr. Tun's temporary privileges be terminated immediately and that no further privileges be granted at that hospital. Dr. Chung was Chief of Surgery at that time. As a result of those communications, the Credentials Committee met on July 13, 1982 and reversed the Executive Committee's recommendation to approve provisional privileges in anesthesiology for Dr. Tun

and recommended that no privileges be granted Dr. Tun (R 293).

On July 27, 1982, the Medical Executive Committee agreed to reject Dr. Tun's application for provisional privileges in anesthesiology based on the report from Dr. Chung (R 294). On July 28, 1982, Mr. Cook advised Dr. Tun of the Medical Executive Committee's action rejecting his application for medical staff membership and credential privileges (R 295).

On August 13, 1982, Dr. Tun withdrew his appliction for privileges at Kapiolani (R 296),which construed Dr. Tun's August 13, 1982 letter to be a waiver of his right to a hearing following notification of the Medical Executive Committee's recommendations (R 297). On October 14, 1982, Dr. Tun's attorney again advised Kapiolani that Dr. Tun was withdrawing his

application for hospital privileges (R 298-299). Nevertheless, the hospital continued to advise Dr. Tun of his appeal rights (R 300). Following that and correspondence from Dr. Tun's attorney, the hospital again advised Dr. Tun that he had waived his appellate rights (R 303).

On October 20, 1982, Dr. Hattori, as Chief of Anesthesiology at Kapiolani, in response to the Queen's inquiry, advised Queen's that Dr. Tun's provisional privileges at Kapiolani were denied following termination of his temporary privileges and the final denial was done by the Board on 9/82. Moreover, Dr. Hattori stated: "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology." (R 304).

It is noteworthy that in all of the evidence submitted there is no showing that the Board at Kapiolani nor any of the Credentials Committee members made any independent examination of the medical charts and records or contact with Dr. Tun to find out his version of what happened on the July 7, 1982 surgery which Dr. Hattori falsely reported according to the Affidavit of Dr. Tun. According to the Affidavit of Richard Davi, since Dr. Tun never availed himself of any right of review of appeal provided in the bylaws and, moreover, the decisions of the various committees for the hospital rely upon the medical expertise of the doctors who have staff privileges at Kapiolani as to the competency of physicians applying for privileges at that hospital (R 241). The inference is that since Dr. Tun did not avail himself of the appellate process

in the hospital, there was no need for the hospital committees to independently inquire of Dr. Tun what his version of the facts was; so, accordingly, they relied on Dr. Hattori's observation of the two procedures on July 7, 1982 without any further inquiry.

According to Dr. Chung, he acted upon the oral report from Dr. Hattori regarding Dr. Tun's two procedures observed on July 7, 1982 and in reliance on that report, Dr. Tun's privileges were revoked and no further privileges were granted (R 245-246). Likewise, Dr. Shim, a member of the Credentials Committee and Chairman of the Medical Executive Committee, verified that the actions of both committees were based upon the report from Dr. Hattori who felt that Dr. Tun should not have any privileges at Kapiolani (R 247-248). According to Dr. Hattori, all of his

observations and reporting to the peer review process was pursuant to Hawaii law. He responded to the Queen's questionnaire to Kapiolani concerning Dr. Tun's privileges and that he answered the quesionnaire on behalf of Kapiolani (R 330). He denied personally filing any complaint with the State of Hawaii Board of Medical Examiners concerning Dr. Tun but was merely subpoenaed to testify as to his observations of the two procedures performed by Dr. Tun (R 331). He further states in another Affidavit (R 311), that he has staff privileges at Queen's but does not serve on Queen's Medical Executive Committee or their Board of Trustees (R 311). Dr. Hattori goes on to state in one of his Affidavits that at all times relevant herein, he was not an employee, agent or servant of either Kapiolani or Queen's (R 310), but that he

was acting as a private individual and physician (R 310). He further states that he is not a member of the Board of Trustees of Kapiolani and his only participation in that Board's decision was to report his observations of the June 7, 1982 procedures performed by Dr. Tun (R 311). Dr. Hattori's other Affidavit (R 329-331) says that he is not a member of the Medical Executive Committee nor the Board of Trustees at Kapiolani, but that, given his position as Chief of Pediatric Anesthesiology, he filled out the questionnaire on behalf of Kapiolani (R 330). He further stated that, because of his position of Chief of Pediatric Anesthesiology, he sits on the Surgical Executive Committee at Kapiolani which makes recommendations to the Medical Executive Committee, both committees being peer review committees established

pursuant to Hawaii law (R 330). He says that he informed the other members of the Surgical Executive Committee and the Medical Executive Committee about his observations on the two procedures performed by Dr. Tun on July 7, 1982 and that, based upon those observations, he concluded that "Dr. Tun needed further training in pediatric anesthesiology before being allowed to perform anesthesia for children" (R 329).

Based upon the evidence, the pleadings and argument including the various memoranda, the trial court granted the Respondents' Motions for Summary Judgment (T 22) and entered judgments accordingly (R 373-376) and amended the same to include Dr. Hattori (2R 13-17).

The Supreme Court of Hawaii held that since Dr. Tun did not exhaust his available administrative remedies through

the hospitals, he was precluded from recovering any damages against the hospitals and their review personnel and, moreover at least as to Kapiolani, they were immune from any civil liabilities claimed by Dr. Tun and his wife; hence, the summary judgment motions were properly granted. However, the Court correctly held that as to Dr. Hattori, he was not immune and the failure to exhaust the administrative remedies defense was not available to him; hence, the summary judgment in his favor was reversed and remanded for proceedings consistent with that opinion (App. 1 - 15).

The Hawaii Supreme Court denied Petitioners' Motion for Reconsideration on July 7, 1986, with the Judgment on Appeal being entered August 19, 1986 affirming the Summary Judgment as to all Defendants except Dr. Hattori, against whom his

Summary Judgment was reversed and remanded for further proceedings against Dr. Hattori.

This Court has jurisdiction pursuant to **28 U.S.C. §1257** from the final Judgment entered July 7, 1986, affirming the granting of the Summary Judgment against Petitioners dismissing Petitioners' claims against Respondents.

The constitutional issues were raised first in the Amended Complaint by Petitioners contending Respondents violated their constitutional rights (R 34, 36, 37 and 42). Constitutional issues were likewise raised in the Hawaii Supreme Court in both Opening and Reply Briefs filed by Petitioners, in that the hospital and peer-group doctors violated the procedural due process requirements of **SILVER vs. CASTLE MEMORIAL HOSPITAL**, 53 Haw. 475, 497 P.2nd 564, (1972). These

issues were also raised in the Motion for Reconsideration filed June 27, 1986. However, the Hawaii Supreme Court found no violation of the due process requirements and that the evidence was insufficient to prove the futility of exhausting the hospital administrative remedies, plus the hospitals were immune anyway, consequently no liability existed, and Summary Judgment was appropriate.

ARGUMENT

I. THE HAWAII SUPREME COURT OPINION AFFIRMING SUMMARY JUDGMENT FOR RESPONDENTS VIOLATES THE UNITED STATES SUPREME COURT OPINIONS, OTHER FEDERAL DECISIONS, AND ITS OWN PRIOR DECISION.

In reviewing lower court decisions on summary judgment motions, the appellate court reviews the case de novo, **UNITED STATES vs. DIEBOLD, INCORPORATED**,

369 U.S. 654, (1962). In so doing, the evidence is viewed in the light most favorable to the party opposing the motion. These rules are well recognized in Hawaii, **BEAMER vs. NISHIKI**, 66 Haw. 572, 670 P.2nd 1264, (1983).

In spite of these rulings and other Hawaii authority such as **LAUER vs. Y.M.C.A. OF HONOLULU**, 57 Haw. 390, 557 P.2nd 1334, the Hawaii Supreme Court determined erroneously from the record that there was no genuine issue as to any material fact and that Respondents were entitled to a dismissal as a matter of law. Such decision violates **ADICKES vs. S. H. KRESS AND COMPANY**, 398 U.S. 144, (1970), which held in a civil rights case under **42 U.S.C. §1983**, that summary judgment was inappropriate since the movant had the burden of proving the absence of a genuine issue as to any

material fact. Likewise, **DAMICO vs. CALIFORNIA**, 389 U.S. 416, (1967), held that it was reversible error for the three-judge District Court to dismiss petitioner's complaint charging violations of **42 U.S.C. §1983** and **28 U.S.C. §1343** because the apellants failed to exhaust their adequate administrative remedies.

Other Supreme Court opinions clearly hold that summary judgment is not appropriate in civil antitrust actions in which damages and injunctive relief are sought, **FORTNER ENTERPRISES, INC. vs. UNITED STATES STEEL CORP.**, 394 U.S. 495, (1969). **POLLER vs. COLUMBIA BROADCASTING SYSTEM**, 368 U.S. 464, (1962), reversed and remanded the summary judgment for defendants in an action to recover treble damages for civil violations of the Sherman Antitrust Act. In so holding, the Court said, at Page 473:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be apprised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice"."

Summary judgment for the defendants was likewise reversible error in a civil antitrust suit in **WHITE MOTOR COMPANY vs. UNITED STATES**, 372 U.S. 253, (1963). Thus, trial in complex cases is clearly the due-process solution rather than summary judgment by affidavit.

There is no question that the Petitioners' Amended Complaint charged violations of both civil rights acts, **42 U.S.C. §1983**, and the Sherman Antitrust Act; consequently, the foregoing decisions mandate that the summary judgment motions

should have been denied. The standard for granting summary judgment is even more rigorous in antitrust litigation, **HOSPITAL BUILDING CO. vs. TRUSTEES OF REX HOSPITAL**, 425 U.S. 738, (1976).

In the context of hospital litigation, again we find that motions for summary judgment by the defendants are looked upon with disfavor, particularly where discovery has not been completed, **GLEN EDEN HOSPITAL, INC. vs. BLUE CROSS AND BLUE SHIELD OF MICHIGAN, INC.**, 740 F.2nd 423, (6th Cir., 1984). There the Court held the District Court abused its discretion in failing to permit the plaintiff to conduct further discovery to oppose the motion for summary judgment. In the case at bar, the Amended Complaint had been filed, answers filed, and then the motions for summary judgment came on without any discovery whatever; only

affidavits were used in support thereof and in opposition thereto. There were numerous issues of fact remaining, all of which the Hawaii Supreme Court said should have been resolved in the hospital administrative process. As will be pointed out more specifically in the second part of this argument, that likewise was clear error. Petitioners had argued on the appeal that, contrary to **CRUTCHFIELD vs. HART**, 2 H.A. 250, 630 P.2nd 124, where they did not have an adequate opportunity to conduct and conclude discovery on the principal issues in the lawsuit, summary judgment was totally inappropriate. This argument and the clear holdings of the foregoing cases obviously were not sufficient to convince the Hawaii Supreme Court that the trial court was in error.

Other courts have agreed that summary dismissal of antitrust claims against hospitals and their personnel are inappropriate without further discovery or trial, **MISHLER vs. SAINT ANTHONY'S HOSPITAL SYSTEMS**, 694 F.2nd 1225, (10th Cir., 1981), and **VUCIECEVIC vs. MacNEAL MEMORIAL HOSPITAL**, 572 F.Supp. 1424, (N.D. Ill., 1983). In the **Vuciecevic** case, a physician sued the public health care facility and professional corporation claiming the defendants engaged in a conspiracy and boycott in restraint of trade and national origin employment discrimination. The Court held that "the granting of the summary judgment for the defendants is precluded as premature". The same can be said in the case at bar. Even where qualified immunity is a defense issue in a §1983 action, summary judgment is not appropriate, **JACKSON vs. STATE OF**

MISSISSIPPI, 644 F.2nd 1142, (1981). this is so because the qualified immunity granted by a statute or case law is to be determined by both a subjective and an objective test which can only be ultimately resolved at a trial on the merits, not on affidavits.

Accordingly, it is respectfully submitted that the Hawaii Supreme Court not only failed to follow the holdings of this Court, but it didn't even follow its own prior opinions on summary judgment motions in complex cases which, as per its own memorandum opinion, involve civil damages for multiple causes of action such as defamation, violation of due process, conspiracy to deny constitutional rights and restrict interstate business, infliction of emotional distress, malicious prosecution and abuse of process, breach of contract, negligence,

unfair and deceptive trade practices, and violation of the Federal and State antitrust provisions. Instead, the Court chose to decide the case on exhaustion of administrative remedies and immunity issues. This in and of itself could constitute a deprivation of due process and equal protection of the laws when considering the United States Supreme Court opinions cited herein.

II. EXHAUSTION OF HOSPITAL REMEDIES IS NEITHER REQUIRED NOR A PREREQUISITE WHERE THE PHYSICIAN IS SEEKING DAMAGES AND MOREOVER PROVES THAT THE HOSPITAL PEER-REVIEW PROCESS IS FUTILE.

Petitioners argued unsuccessfully in the Hawaii Supreme Court that **QASEM vs. KOZAREK**, 716 F.2nd 1172, (7th Cir., 1983), decided that a doctor who is denied certain hospital privileges on the

recommendation of the credentials committees which was adopted by the board of directors for the hospital and where the doctor had the right to appeal that decision through procedures established by the hospital bylaws, the doctor did not have to appeal the decision but instead may directly file his lawsuit against the committee doctors for tortiously interfering with his contract with the hospital for which he seeks compensatory damages. Thus, **Qasem** clearly says that the doctor is not required to exhaust his administrative remedies before suing in tort and contract for damages against the peer review committee who decided that his hospital privileges should be denied or restricted. The simple reason for this is that the hospital reviewing body is not empowered to award him any damages and, hence, it would be an act of futility for

him to pursue those administrative remedies in order to get monetary damages. His best remedy and his sole remedy is in court against the offending parties who have interfered with his contract or otherwise tortiously caused him harm and damage. This view had likewise been adopted in **COWAN vs. GIBSON**, 392 S.W.2nd 307, (Mo., 1965), in which one doctor sued another for conspiracy damages without being required to first pursue his hospital remedies.

This reasoning is sound and clearly appropriate in this case. Here Dr. Hattori had told Dr. Tun that Dr. Tun would never obtain staff privileges, consequently his business was ended at Kapiolani Hospital. Moreover, the Peer Review Committee was the one that denied his privileges, and it is inconceivable that they would award him damages for

their own denial of his privileges. Such a requirement is a nullity and makes no sense in the context of this case. In fact, the Hawaii Supreme Court did not even address the issue, although they did recognize that Dr. Tun was asserting that to be the law (App. 6).

This Court clearly held in **PATSY vs. BOARD OF REGENTS OF THE STATE OF FLORIDA**, 457 U.S. 496, (1982), inter alia, that exhaustion of the State administrative remedies is not a prerequisite to an action in Federal court for damages under **42 U.S.C. §1983**. The same can be said in the case at bar with respect to Petitioners' claims against the Respondents. In addition, Petitioners have other theories of recovery, but they clearly do encompass civil rights violations under **42 U.S.C. §1983**, inasmuch as at least Respondent Queen's admits to

receiving Hill-Burton funds, has received Federal and State funds under the Medicare/Medicaid programs, and is a non-profit, private hospital exempt from certain Federal and State taxation, plus it is affiliated with the University of Hawaii School of Medicine. Accordingly, under **CHIAFFITELLI vs. DETTMER HOSPITAL, INC.**, 437 F.2nd 429, (6th Cir., 1971), receipt of Hill-Burton funds makes the hospital subject to a civil rights claim under **42 U.S.C. §1983.** To the same effect is **WEAVER vs. UNITED STATES**, 437 F.2nd 431, (8th Cir., 1971). There is a contrary decision in **ASCHERMAN vs. PRESBYTERIAN HOSPITAL OF PACIFIC MEDICAL CENTER, INC.**, 507 F.2nd 1103, (9th Cir., 1974). Other cases holding that receipt of Hill-Burton funds and other participation by the States through tax exemption status constitute State action

sufficient to subject to the hospital to a civil rights action under **42 U.S.C. §1983**, are **SIMKINS vs. MOSES H. CONE MEMORIAL HOSPITAL**, 323 F.2nd 959, (4th Cir., 1963), Cert. den., 376 U.S. 938; **SAMS vs. OHIO VALLEY GENERAL HOSITAL ASSOCIATION**, 413 F.2nd 826, (4th Cir., 1969).

SILVER vs. CASTLE MEMORIAL HOSPITAL, 53 Haw. 475, 497 P.2nd 564, (1972), likewise construed receipt of Hill-Burton funds of over $500,000 and State funds by the hospital during construction required the hospital to accord the doctor procedural due process, which not only meant the hospital was required to give him notice of the charges against him, but the hospital board must remain objective in its decision making capacity and that it "must not be tainted by its own premature decisions prior to the hearing". Thus, even the Hawaii Supreme Court

arguably must consider receipt of State and Federal funds as subjecting the private, non-profit hospital to the due process requirements of the **Fourteenth Amendment** and, hence, their actions constitute State action as used in **42 U.S.C. §1983.**

Along those lines of judicial theory, **IN re MURCHISON**, 349 U.S. 133, (1955), said in deciding on certiorari whether trial by a judge who had conducted a secret "one man jury proceeding" violated due process, said at Page 136:

> "A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered."

There is no question that this tenet of due process applies to even administrative agencies and hearings, **GIBSON vs. BERRYHILL**, 411 U.S. 564, (1973). In **Gibson**, increased business to the board members by reason of denial of the license to the practitioners constituted sufficient personal financial interest so as to invalidate the board's decision by reason of bias "by prejudgment and pecuniary interest that it could not constitutionally conduct hearings looking toward the revocation of appellee's licenses to practice optometry.". Hence, the Court in **Gibson** was convinced that the optometrist had no adequate administrative remedy requiring exhaustion. The same can be said in the case at bar, because quite clearly when Dr. Hattori told Dr. Tun that he would never get staff privileges at that hospital, since Dr. Hattori was Chief

of Anesthesiology, the matter of staff privileges at Kapiolani was exhausted and futile. Moreover, the Peer Review Committee was likewise tainted by bias, since they all agreed they relied exactly on what Dr. Hattori told them in reaching their conclusion to terminate or suspend Dr. Tun's privileges. In keeping with **GIBSON vs. BERRYHILL**, supra, their decision was biased, and moreover they were pecuniarily involved in the outcome, further tainting their administrative decision making capacity. The same can be said with respect to Queen's and their administrative personnel, because they all have a personal, financial interest as anesthesiologists at Queen's, and it will only inure to their benefit to exclude Dr. Tun from that hospital. They, likewise, were disqualified under **GIBSON vs. BERRYHILL**, supra. Moreover, as abundantly

pointed out in the Statement of the Case, the Queen's decision to reduce Dr. Tun's temporary privileges without notice and without a hearing in 1982 abundantly reinforces his conclusion that any appeal through their administrative procedures was futile, thereby extinguishing the exhaustion requirement, if any such existed.

This conclusion is further reinforced in **CAFFERELLO vs. U. S. CIVIL SERVICE COMMISSION**, 625 F.2nd 285, (9th Cir., 1980). There no appeal was required from a board decision because it was apparent that the board's position was not to be changed; hence, exhaustion was not required where pursuit would have been futile.

Even the Hawaii Intermediate Court of Appeals recognizes such doctrine to prevent denial of justice in **BRIGHT vs.**

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, 2 H.A. 471, 634 P.2nd 427. In fact, **Bright** also held it reversible error to grant a summary judgment on the grounds the plaintiff had not exhausted the administrative remedies, since that was an issue of fact.

In the context of hospital litigation between doctors and hospitals, some State courts have recognized the futility doctrine as it applies to exhaustion of administrative remedies, **GARROW vs. ELIZABETH GENERAL HOSPITAL AND DISPENSARY**, 79 N.J. 549, 401 A.2nd 533.

Likewise, the Alaska Supreme Court in **EIDELSON vs. ARCHER**, 645 P.2nd 171, (1982), recognized that if exhaustion of administrative remedies is futile, the doctor may still have a claim for damages. To the same effect is **WILLIS vs. SANTA ANNA COMMUNITY HOSPITAL ASSOC.**, 376 P.2nd

568, 26 Cal.Rptr. 640, which held inter alia that the physician states a common law cause of action against the hospital and its directors, administrator and other doctors where it is claimed they denied him access to the hospital facilities as a result of a conspiracy designed to restrain competition and deprive him of his practice in order to benefit competing members of the conspiracy where the defendants, pursuant to the conspiracy, terminated his hospital staff privileges and membership without any hearing or assigned reason except that they indicated to the public that he was expelled because of questionable competence and reputation.

The California Supreme Court in **WESTLAKE COMM. HOSP. vs. SUPERIOR COURT OF L.A. COUNTY**, 551 P.2nd 410, 131 Cal.Rptr. 90 (1976), reaffirmed **Willis**.

ANTON vs. SAN ANTONIO COMMUNITY HOSPITAL, 19 Cal.3rd 809, 140 Cal.Rptr. 442, 567 P.2nd 1162, also said:

> "The rule that a party must exhaust his administrative remedies prior to seeking relief in the courts 'has no application in a situation where an administrative remedy is unavailable or inadequate' *** (citations omitted)."

To permit hospital boards and committees to decide whether Dr. Tun has been defamed usurps the function of the court system by delegating judicial functions to hospital boards and peer groups.

As to Queen's, futility at work is obvious when twice in 1982 they reduced Dr. Tun's privileges without a hearing and charges apparently on the basis of Dr. Hattori's report. Then in 1983 - 84, Queen's terminated his privileges when he refused to accede to their demands to change an answer on his application. Not

only did this violate **SILVER vs. CASTLE**, supra, but Queen's violated their own By-Laws (R 104) as well.

Thus, only after he filed the lawsuit was he accorded his procedural due process under **SILVER vs. CASTLE MEMORIAL HOSPITAL**, supra.

It is therefore submitted that under **WEISS vs. YORK HOSPITAL**, 745 F.2nd 786, (3rd. Cir., 1984), such a restrictive policy decision with respect to Dr. Tun's privileges at both Queen's and Kapiolani was equivalent to a concerted refusal to deal with him, rendering their decisions and actions illegal per se under the Sherman Antitrust Act, for clearly even the medical profession is subject to the antitrust laws, **ARIZONA vs. MARICOPA COUNTY MEDICAL SOCIETY**, 457 U.S. 332, (1982).

With regard to Kapiolani and their personnel, all of their answers denied Paragraph 25 of the Amended Complaint which alleged that Dr. Hattori had told Dr. Tun that there was no way he would practice anesthesiology at Kapiolani. The answers denied such because they were without sufficient information to either admit or deny it. This alone is sufficient to raise an issue of material fact on the issue of futility. Since Queen's did not file an answer but only moved for summary judgment, again the substantial issue of fact exists on futility alone.

The Hawaii Supreme Court opinion on the issue of futility held that such issues should have been raised and argued before the hospital review committees and, moreover, the record did not show how the appellate process would have been futile

and that Dr. Tun's personal views are insufficient grounds to support his contentions. The simple answer to these holdings is that they support the conclusion that they are all issues of fact, both in the pleadings and the affidavits and focus on opinion evidence, all of which are reasons for denying motions for summary judgment as previously argued in Part I hereinabove. Admittedly, this area needs further development of facts by discovery, but the record clearly shows that there was no investigation independently done by any of the boards or doctors concerning the incompetence of Dr. Tun. All of them simply accepted what Dr. Hattori said and, therefore, it was futile to proceed, because the medical charts show that there was no cardiac arrest. If they wouldn't examine the charts and medical evidence but simply

accepted Dr. Hattori's word, the futility of appeal is obvious.

III. QUALIFIED IMMUNITY IS A QUESTION OF FACT TO BE RESOLVED AT THE TRIAL, NOT ON MOTION FOR SUMMARY JUDGMENT.

The Hawaii Supreme Court, in its Memorandum Opinion, held that **HRS §663-1.7** grants a qualified privilege to committee members and that **AKU vs. LEWIS**, 52 Haw. 366, 477 P.2nd 162, (1972), requires the Plaintiff to adduce clear and convincing proof that a defendant was motivated by malice and not by an otherwise proper purpose in order to overcome the qualified privilege. Dr. Tun had cited in his Opening Brief an extensive list of the facts and inferences establishing by clear and convincing evidence that there was evidence of malice and failure to ascertain the truth of the

facts in order to preclude application of the qualified privilege by the Respondents. In fact, the Hawaii Supreme Court was convinced that, at least as to Dr. Hattori, there was sufficient evidence to withstand the motion for summary judgment. Consequently, if Dr. Hattori is subject to liability, then failure on the part of the other hospital personnel and their hospitals to adequately investigate the claimed incompetence of Dr. Tun renders them liable, because the statute clearly requires before immunity can apply that the committee member acted "without malice after having made a reasonable effort to ascertain the truth of the facts on which he acted". Here, all the evidence was that no investigation was done by any of the peer review personnel as required by the statute. As such, this constituted clear and convincing evidence

of malice sufficient to survive the motion for summary judgment. After all, the standard for measuring qualified immunity is both objective and subjective in testing good faith, **WOOD vs. STRICKLAND**, 420 U.S. 308, (1975). In other words, in the context of this case, if the peer review personnel and the hospital knew or reasonably should have known that the action that they took against Dr. Tun in denying, suspending, or reducing his privileges would violate his constitutional rights to due process and equal protection, or if they took such action maliciously to cause the deprivation of such rights or other injury to his reputation, they lose any such qualified immunity under **HRS §663-1.7**, **WOOD vs. STRICKLAND**, supra.

Also, under such a peer review statute, "a person participating in a

review of his peers can be found to have acted in bad faith even if the procedural rights set forth in the statute were not denied, but whether these procedural rights were denied is a factor which must be considered in determining whether he acted in bad faith.", **QASEM vs. KOZAREK**, supra.

As previously cited, a motion for summary judgment is not appropriate where qualified privilege is a defense issue, **JACKSON vs. STATE OF MISSISSIPPI**, supra.

The Hawaii Supreme Court did not include within its decision that Queen's was immune from civil liability under **HRS §663-1.7**, but only held that Kapiolani and its named Defendants were so immune. As such, there is no decision by them on that issue; consequently, Petitioners argue that apparently Queen's is not immune. This issue was raised on Motion

for Reconsideration, but the Motion was denied without argument by the Hawaii Supreme Court.

Moreover, **HRS §663-1.7(c)** does not immunize the hospital for peer review, but only for communicating the results of peer review between peer groups of two hospitals. It's not clear whether the provisions of Subparagraph **(b)** of that statute apply to Subsection **(c)** concerning qualified privilege, but it is clear that Subsection **(c)** does not confer blanket immunity upon the hospitals for their actions against doctors applying for staff privileges.

HRS 663-1.7(d) also requires that the final peer review report which is adverse to the doctor be communicated to the Department of Commerce and Consumer Affairs and that if such report is superseded by resignation or voluntary

action that occurred in lieu of disciplinary action, the report shall so state. In the case at bar, no one communicated to the Department of Commerce and Consumer Affairs or to Queen's hospital that Dr. Tun had voluntarily withdrawn his application for staff privileges at Kapiolani. Hence, the statute was violated by Kapiolani and constitutes further evidence of malice as per **Qasem**. The situation is analgous to a re-publication of a falsehood defaming the doctor which subjects the hospital to liability for re-publication as per **MURPHY vs. MAUI PUB. CO.**, 23 Haw. 804, (1917).

Finally, the Hawaii Supreme Court said in its opinion that the accuracy of the report were issues for the administrative hearing. That holding is easily resolved, because Dr. Hattori had already told Dr. Tun that he would never

get privileges, consequently, everything hinges on whether exhaustion of the hospital remedies applies and, as previously argued, it does not where it is futile or tainted by bias or pecuniary interest. All of those are issues of material fact to be resolved at the trial, not upon affidavits. However, Petitioners point out that the whole action and reaction against Dr. Tun originates with Dr. Hattori. If Dr. Hattori falsely accused Dr. Tun of malpractice and none of the other Respondents independently ascertained the truth of that, they are subject to liability for republication and reaction to that originally false report. Since the action is reversed and remanded as to Dr. Hattori, it seems only logical that all other issues should likewise be remanded for trial as to all Respondents and not simply decided on the affidavits

without there ever being any discovery at all being conducted by any party. To hold otherwise is a deprivation of due process and equal protection of the judicial system which is the cornerstone of our society. If the courts of our land are not open to doctors and hospitals to resolve their damage claims, it's a sad day for American justice.

CONCLUSION

For each and all of the foregoing reasons, Petitioners request the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Hawaii entered in this case.

Respectfully submitted,

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IN THE SUPREME COURT

OF THE STATE OF HAWAII

NO. 10564

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

MEMORANDUM OPINION

Plaintiffs-appellants Dr. Than Tun and Thida Swe Tun appeal from a grant of summary judgment in favor of defendants-appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center (Kapiolani), Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Dr. Mitsuo Hattori, Queen's Medical Center, Dr. John (sic) Pegg, Dr. Dan Yoshioka and Dr.

Arthur Sprague. We affirm in part and reverse in part.

I.

Dr. Tun applied for anesthesiology privileges at Kapiolani. Initially, he was granted temporary privileges but those privileges were terminated based on Dr. Hattori's observations of Dr. Tun's performance in the operating room. Dr. Chung, Chief of Surgery, relied on Dr. Hattori's observations and recommended the termination to Mr. Davi, President. Dr. Hattori, Chief of Anesthesiology, had observed Dr. Tun on two occasions and believed his performance to be unsatisfactory. Dr. Tun, stating that he did not desire to use the facilities withdrew his application without pursuing the administrative appeal process as provided under the Medical Staff By-Laws. Kapiolani formally denied Dr. Tun's

application, taking the view that Dr. Tun's letter of withdrawal was a waiver of his right to an appeal hearing.

Subsequent to the denial of staff privileges to Dr. Tun by Kapiolani, Dr. Tun applied to Queen's Medical Center for anesthesiology privileges. On the aplication form, Dr. Tun answered "No" to the question of whether his privileges had ever been revoked, denied or suspended at any other hospital. Dr. Hattori, in responding to Queen's questionnaire, stated that, "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

Queen's Credentials Committee recommended that Dr. Tun's application for privileges be denied. The Medical Executive Committee affirmed the recommendation and notified Dr. Tun of the

denial based on, inter alia, unethical conduct in answering the question improperly. Dr. Tun was advised that he had a right to request an informal hearing before the Medical Executive Committee and a full hearing before the Board of Directors after the hearing and decision by the Medical Executive Committee. A hearing before the Medical Executive Committee was scheduled at the request of Dr. Tun but Dr. Tun failed to attend the hearing. Instead, Dr. Tun commenced action for damages in the curcuit court.

Appellants sued Queen's, Kapiolani, and their respective doctors and administrators for monetary damages based on a multiple causes of action, summarized as follows: libel, slander and defamation; improper revocation of privileges; violation of due process; conspiracy to deny Dr. Tun his

constitutional rights and to restrict interstate business; intentional infliction of emotional distress; malicious prosecution and abuse of process; breach and tortious breach of contract; negligence; unfair and deceptive trade practices; loss of consortium; promissory estoppel; and intentional, malicious, wanton and willful acts of defendants. The trial court granted summary judgment in favor of defendants based on Dr. Tun's failure to exhaust the hospitals' administrative remedies. We affirm as to all defendants except Dr. Hattori.

II.

Appellants assert that Dr. Tun is excused from exhausting the available administrative remedies for the following reasons: (1) the administrative review would have been futile and would have

caused undue hardship; (2) Dr. Tun was deprived of procedural due process; (3) appellants may sue the peer review committee for damages without exhausting the administrative remedies; and (4) the defendants acted with malice against Dr. Tun under Hawaii Revised Statutes (HRS) § 663-1.7(b)[1].

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1. The pertinent part of § 663-1.7(b) reads:

> (b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:
>
> (1) The member was authorized to perform in the manner in which he did; and
>
> (2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

III.

Was Dr. Tun bound to exhaust the administrative remedies available to him? And if so, would the pursuit of administrative appeals have been an act of futility or cause undue hardship?

It is generally accepted that a physician must exhaust available internal remedies afforded by the hospital before bringing a suit for damages. Westlake Community Hospital v. Superior Court of Los Angeles County, 17 Cal. 3d. 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976); Eidelson v. Archer, 645 P.2d 171 (Alaska 1982). However, the exhaustion of remedies requirement has been excused where the administrative review process is either inadequate or would be futile to the certainty of an adverse decision. Eidelson, supra, at 181; see also Glendale City Employees' Ass'n v. City of Glendale,

15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975).

Appellants contend that the available administrative appeal procedure would have been futile since Dr. Tun felt that Queen's had made a prejudgment, and that Queen's did not conduct a sufficient investigation prior to reducing his privileges. It was also apparent that Dr. Tun's and Queen's interpretation of the application differed. These contentions by appellants are issues which should have been raised and argued before the Medical Executive Committee and ultimately before the Board of Directors if necessary. Moreover, appellants failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's had already prejudged Dr. Tun. Dr. Tun's personal inclination or views

are insufficient grounds to support appellants' contentions.

As to Kapiolani, here again appellants fail to give any specific grounds as to why the administrative appeal process would have been futile or would have put Dr. Tun in undue hardship to pursue his administrative appeal. Instead, appellants asserted that since Dr. Tun withdrew his application, pursuing any administrative remedy was unnecessary. Yet, the record shows that Dr. Tun "withdrew his application" after notice of the termination of his temporary privileges. Therefore, any disagreement with Kapiolani should have been presented at a hearing before an Ad Hoc Committee of the medical staff. Dr. Tun failed to avail himself of this hearing as provided in the By-Laws.

IV.

Was Dr. Tun denied his right to procedural due process?

The decision of a hospital board will be upheld unless the doctor involved was denied procedural due process or the hospital abused its discretion. Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972). Procedural due process requires that a doctor whose privileges are being revoked or who is being denied appointment or reappointment to the medical staff be given an opportunity to appeal the denial at a hearing. Further, the hearing must comport with certain procedural safeguards such as timely notice of hearing and a statement specifying the reasons for the initial decision of the hospital board. Silver at 485, 497 P.2d at 571.

Appellants claim that Dr. Tun was denied due process when Kapiolani terminated his temporary privileges without written charges or a proper hearing, but the record indicates that the notification by Kapiolani comported with the procedural due process requirements in Silver. Kapiolani notified Dr. Tun that the termination of his temporary privileges was due to two unacceptable anesthetic cases performed by him at the hospital and observed by Dr. Hattori. The notice informed Dr. Tun of his right to request a hearing within thirty days, and that failure to request a hearing would constitute a waiver of his right to do so.

Although Dr. Tun's privileges were actually terminated prior to hearing, the hospital took such action "in the best interest of patient care." We do not consider this an abuse of discretion by

Kapiolani whose physicians and supervisors were in the best position to make a decision for the benefit of their patients.

As to Queen's, appellants claim that Dr. Tun's privileges were denied on the basis of his application rather than his competency. This is a matter within the hospital's discretion. Further, the record shows that Queen's denied Dr. Tun's privileges due to serious questions regarding his ethical conduct. Queen's informed Dr. Tun that they concluded that he had falsified information and specified the grounds upon which they had based their conclusion. Queen's further informed Dr. Tun of his right to request a hearing with the Medical Executive Committee and the right to review his own staff file. We find no denial of due process or abuse of discretion here.

V.

Appellants contend that Kapiolani and its named defendants acted with malice. Under HRS § 663-1.7(b), Kapiolani and the members of its peer review committee are not liable for acts done in furtherance of the committee's purpose and without malice. This section confers a qualified privilege on the committee members, placing the burden on the plaintiff to adduce clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose. See Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970). The by-laws provide similar immunity, excepting acts done in malice and without good faith.

Appellants also contend that Kapiolani failed to investigate the accuracy of Dr. Hattori's report. The action of Kapiolani in relying on the

Chief of Surgery's recommendation comports with procedure set down in the by-laws. The accuracy and truth of the report by Dr. Hattori were isues appropriate for an appeal hearing. At the hearing, Dr. Tun would have had the opportunity to present evidence and witnesses in his favor.

Based on the record, we find no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees. We conclude that under HRS § 663.7(b) Kapiolani and its named defendants are immune from the civil liabilities claimed by appellants.

VI.

Appellants further contend that Dr. Hattori was motivated by anger and acted with malice in writing a false report. Dr. Hattori is not a member of Kapiolani's peer review committee and therefore he

does not fall under HRS § 663-1.7(b). We, therefore, hold that the trial court committed error in granting summary judgment in favor of Dr. Hattori solely on the basis of appellants' failure to exhaust the administrative remedies available to them. We remand for proceedings anew on the causes of action claimed by the apellants against Dr. Hattori.

VII.

Appellants' other claims are without merit.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawaii, June 17, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

IN THE SUPREME COURT

OF THE STATE OF HAWAII

NO. 10564

THAN TUN, M. D., et. ux.,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

ORDER

Defendant-appellee Hattori's motion for reconsideration filed on June 26, 1986, and Plaintiffs-appellants' motion for reconsideration filed on June 27, 1986, are hereby denied.

DATED: Honolulu, Hawaii, July 7, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 84-0181

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

ORDER GRANTING DEFENDANTS' QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D.'s Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be granted, having come on for hearing before the Honorable Frank T. Takao on November 13, 1984, and the Court having reviewed the pleadings

and records on file and the Memoranda and Affidavits submitted by counsel, and the Court having heard the arguments of Counsel, and the Court being fully advised in the premises, and the Court having found that:

1) The Queen's Medical Center Medical-Dental Staff Bylaws provide the procedure to be followed for the processing of a physician's application for staff membership and clinical privileges;

2) The Queen's Medical Center Medical-Dental Staff Bylaws provide an administrative remedy to be followed in the event a peer review committee recommends an adverse decision;

3) The Queen's Medical Center adhered to their Bylaws by providing timely notice and opportunity for hearing at each required level of the peer review

process.

4) Plaintiff failed to exhaust the administrtive remedies provided under these Bylaws before resorting to Court.

5) A physician applying for staff membership and clinical privileges must exhaust the administrative remedies provided under the hospital bylaws before resorting to judicial intervention.

IT IS HEREBY ORDERED that Plaintiffs' claim against Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. is dismissed for failure to exhaust the administrative remedies as provided under the Medical-Dental Staff Bylaws of Queen's Medical Center.

Pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(6), Defendants' Motion to Dismiss shall be treated as one for summary judgment as provided in Hawaii

Rules of Civil Procedure Rule 56 and the Plaintiffs' Complaint is hereby dismissed, with prejudice, as to Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. The Court directs the clerk to enter judgment in accordance with the Hawaii Rules of Civil Procedure Rule 58.

DATED: Honolulu, Hawaii, December 6, 1984.

/s/ Frank T. Takao
Judge of the Above-Entitled Court

APPROVED AS TO FORM:
(unsigned)
HAROLD GOBLE
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 84-0181

THAN TUN, M.D., et. ux,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et. al.,

Defendants-Appellees.

AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendants Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung's Motion for Summary Judgment, filed herein on January 8, 1985, and the Joinder of Dr. Mitsuo Hattori, filed on January 21, 1985, having been heard before the Honorable Edwin Honda on February 19, 1985, the parties having been

represented by their respective counsel, and the Court having considered the memoranda, affidavits, exhibits and the arguments of counsel,

IT IS HEREBY ORDERED that the Motion for Summary Judgment by Defendants Kauikeolani Children's Hosital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung and Joinder of Dr. Mitsuo Hattori are GRANTED. This Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment is hereby entered in favor of Defendants Kauikeolani Children's Hosital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, Dr. Stanley M.K. Chung and Dr. Mitsuo Hattori against Plaintiffs Than Tun and Thida Swe Tun.

IT IS FURTHER ORDERED, pursuant to Hawaii Rules of Civil Procedure, Rule 54(b), there being no just reason for delay in the entry of a final judgment, that final judgment be entered against Plaintiffs Than Tun and Thida Swe Tun and in favor of Defendants Kauikeolani Children's Hospital, Kaiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, Dr. Stanley M.K. Chung and Dr. Mitsuo Hattori.

DATED: Honolulu, Hawaii, Apr 2, 1985.

/s/ Edwin H. Honda
Judge of the Circuit Court
of the First Circuit

APPROVED AS TO FORM
AND CONTENT:
/s/ Harold W. Goble
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Attorney for Plaintiff

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John (sic) Pegg, M.D., Dan Yoshioka, M.D.,
and Arthur Sprague, M.D.

/s/ Jeffrey T. Ono
EDMUND BURKE, ESQ.
JEFFREY T. ONO, ESQ.
Attorneys for Mitsuo Hattori, M.D.

Hawaii Revised Statutes, §663-1.7:

Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical or administrative staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession

or occupation, or area of specialty practice, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon any professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability

for any professional society or hospital in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital, or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee. [L 1970, c 60, §1; am L 1975, c 170, §2; am L 1976, c 219, §18]

United States Code, Title 42, §1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any of the rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the Distirct of Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P. L. 96-170. §1.93 Stat. 1284)

Hawaii Rules of Civil Procedure, Rule 56:

SUMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *** (omitted as not pertinent)

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidvaits shall be made on

personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidvaits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary

judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *** (omitted as not pertinent)

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,
Petitioners,
vs.
KAUIKEOLANI CHILDREN'S HOSPITAL,
a Hawaii nonprofit corporation, now
known as KAPIOLANI WOMEN AND CHILDREN'S
MEDICAL CENTER, a Hawaii nonprofit
corporation, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

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Medical Center, Richard Davi,
Paul E. Cook, Dr. Walton K.T. Shim,
and Dr. Stanley M.K. Chung

30pp

QUESTIONS PRESENTED

1. Whether the issues regarding alleged violations of federal antitrust laws and 42 U.S.C. §1983 are improperly raised before this Court.

2. Whether the Hawaii Supreme Court's ruling regarding the issue of due process rests on independent and adequate state grounds.

3. Whether the Hawaii Supreme Court's ruling regarding the issue of exhaustion of administrative remedies rests on independent and adequate state grounds.

4. Whether the Hawaii Supreme Courts's ruling regarding the issue of Children's Hospital, et al.'s immunity rests on independent and adequate state grounds.

5. Whether Dr. Tun waived his claims of improper suspension and denial of privileges.

LIST OF PARTIES

Petitioners are THAN TUN, M.D. and THIDA SWE TUN.

Respondents are KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER; RICHARD DAVI, Individually and as President of Kapiolani Women's and Children's Medical Center; PAUL E. COOK, Individually and as Executive Vice President of Kapiolani Women's and Children's Medical Center; WALTON K.T. SHIM, M.D., Individually and as Chief of Staff of Kapiolani Women's and Children's Medical Center; STANLEY M.K. CHUNG, M.D., Individually and as Chief of Surgery of Kapiolani Women's and Children's Medical Center; THE QUEEN'S MEDICAL CENTER, A Hawaii nonprofit corporation; JON PEGG, M.D., Individually and as Chairman of Anesthesiology Credentials Committee, The Queen's Medical Center; DAN YOSHIOKA, M.D., Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and ARTHUR SPRAGUE, M.D., Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center.

Petitioners' Petition for Writ of Certiorari states that Mitsuo Hattori, M.D. is not a respondent herein.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,
Petitioners,
vs.
KAUIKEOLANI CHILDREN'S HOSPITAL,
a Hawaii nonprofit corporation, now
known as KAPIOLANI WOMEN AND CHILDREN'S
MEDICAL CENTER, a Hawaii nonprofit
corporation, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

Respondents Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Hawaii Supreme Court's opinion in this case.

OPINIONS BELOW

The unpublished Memorandum Opinion of the Supreme Court of Hawaii, filed on June 17, 1986, is printed as Appendix A hereto. The Judgment on Appeal, entered on August 16, 1986, is printed as Appendix B.

JURISDICTION

This Court does not have jurisdiction to grant a Writ of Certiorari under 28 U.S.C. §1257(3). (*See* "II. Reasons for Denying the Petition" below).

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

This case involves Hawaii Constitution Art. 1 §4, Hawaii Revised Statutes §663-1.7, Rule 56 of the Hawaii Rules of Civil Procedure, and Rule 28 of the Hawaii Rules of Appellate Procedure, copies of which are printed as Appendices C, D, E, and F, respectively.

I. STATEMENT OF THE CASE

This Brief in Opposition is submitted on behalf of Respondents Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung (hereinafter collectively referred to as "Children's Hospital, et al.").

A. PROCEDURAL HISTORY OF THE CASE

On August 13, 1984, Petitioners Dr. Than Tun and Thida Swe Tun filed a Complaint in the Circuit Court of the First Circuit, State of Hawaii. (R.1). On August 22, 1985, Petitioners filed an Amended Complaint against Respondents Kauikeolani Children's Hospital (hereinafter "Children's Hospital"), Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim (erroneously identified in the Amended Complaint and in the Hawaii Supreme Court's Memorandum Opinion as Walter K.T. Shim), Dr. Stanley M.K. Chung (all hereinafter referred to collectively as "Children's Hospital, et al."), and Dr. Mitsuo Hattori. (R.25). Also named as defendants were The Queen's Medical Center, Dr. Jon Pegg, Dr. Dan Yoshioka, and Dr. Arthur Sprague (hereinafter collectively referred to as "Queen's Medical Center, et al."). (R.25). ("R." and "2R." refer to volumes 1 and 2, respectively, of the Record on Appeal before the Hawaii Supreme Court).

The Amended Complaint is extremely confusing and often repetitious in setting forth the legal theories against Children's Hospital, et al. However, the theories appear to be as follows: Libel, slander and defamation (Counts I, IV, V); Improper revocation of privileges (apparently referring to the procedures required by the By-Laws) (Count I); Violation of due process under the Hawaii State Constitution and the United States Constitution (5th and 14th amendments),

(Count I) and of 42 U.S.C. §1983 (*see* Count XI); Conspiracy to deprive Dr. Tun of his constitutional rights (Count III), and conspiracy to restrict interstate business (Count X); Intentional infliction of emotional distress (Counts VII, VIII); Malicious prosecution and abuse of process (Count XII); Breach of contract (Count XIII) and tortious breach of contract (XIV); Negligence (Count XV); Unfair and deceptive trade practices (Count VI); Loss of consortium (Count XVI); Promissory estoppel (Count XVII); and allegations that acts were intentional (Count II), malicious, wanton and willful (Count XVIII). (*See* R.25-48).

On October 10, 1984, Queen's Medical Center, et al. filed a Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted. (R.71). An order granting the motion and a judgment were filed on December 7, 1984. (R.160, 164).

On January 8, 1985, a motion for summary judgent was filed on behalf of Children's Hospital, et al. (R.184). Dr. Mitsuo Hattori joined in the motion. (R.315). On January 25, 1985, Dr. Tun filed a Memorandum in Opposition to Motion for Summary Judgment. (R.335). At a hearing on February 19, 1985, the Honorable Edwin H. Honda granted the motion for summary judgment. (Tr.22-23). An Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment and a Judgment were filed on March 6, 1985. (R.373, 375). An Amended Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment and an Amended Judgment were filed on April 2, 1985. (2R.13, 16).

Dr. Tun appealed to the Hawaii Supreme Court. In a Memorandum Opinion filed on June 17, 1986, the Hawaii Supreme Court affirmed the judgments in favor of Respondents Children's Hospital, et al. and Queen's Hospital, et al. and reversed and remanded for further proceedings against Dr. Mitsuo Hattori, who is not a respondent herein. (A copy of the Memorandum Opinion is printed as Appendix A). Dr. Tun and Dr. Hattori each filed motions for reconsideration. By order filed on July 7, 1986, the Hawaii Supreme Court denied Dr. Tun's and Dr. Hattori's motions for reconsideration. Pursuant to the Memorandum Opinion, a Judgment on Appeal was entered on August 19, 1986. (A copy of the Judgment on Appeal is printed as Appendix B).

B. STATEMENT OF FACTS

1. STATUS OF RESPONDENTS CHILDREN'S HOSPITAL, ET AL.

The status of Respondents Children's Hospital, et al. at the time of the facts in this case was as follows:

Kauikeolani Children's Hospital (now known as Kapiolani Women's and Children's Medical Center, hereinafter "Children's Hospital"). This institution was identified in the pleadings as being one of the hospitals involved in this case.

Kapiolani Women's and Chidren's Medical Center was not in existence as an entity at the time of the facts in this case and is not identified anywhere in the records of this case.

Richard Davi was the president of "Children's Hospital".

Paul E. Cook was the vice-president of "Children's Hospital".

Dr. Walton K.T. Shim was Chief-of-Staff at "Children's Hospital".

Dr. Stanley M.K. Chung was Chief of Surgery at "Children's Hospital". (*See* R.184, pp. 45-55)

2. **SUMMARY OF FACTS**

Briefly, the following facts form the basis of this entire case: Dr. Tun applied for anesthesiology privileges at Children's Hospital; "Temporary Privileges" with certain restrictions were granted in June, 1982; the temporary privileges were revoked in July, 1982; and his application for privileges was also denied in July, 1982. All of Dr. Tun's claims against Children's Hospital, Mr. Davi, Mr. Cook, Dr. Shim and Dr. Chung arise out of the granting and then suspension of temporary privileges for anesthesia and the rejection of Dr. Tun's application for privileges. (*See* the Chronology of Events, affidavits of Richard Davi, Paul Cook, Dr. Stanley Chung, Dr. Walton Shim, and Exhibits A through S, which were attached to Children's Hospital, et al.'s Motion for Summary Judgment (R. 184, et seq.), and which are printed as Appendix G (hereinafter "App. G")). A more detailed factual summary follows:

Dr. Tun submitted his application for privileges in anesthesiology at Children's Hospital on June 15, 1982. (App. G, Exhibit D.) On June 23, 1982, Dr. Tun was informed that temporary privileges had been granted, effective immediately, except for "newborn anesthesia and cardiovascular anesthesia" which were not granted, pending documentation of training and experience in those areas. (App.G, Exhibit E.) Dr. Tun had previously applied for privileges on April 15, 1977 (App.G, Exhibit A), which were granted on a probationary basis on October 6, 1977 (App. G, Exhibit B), but Dr. Tun did not utilize these privileges and they are not involved in this lawsuit.

Dr. Tun's application for privileges and the granting of temporary privileges were all done pursuant to Articles V and VI of the By-Laws. (App. G, Exhibit C.) On July 2, 1982, the Surgical Executive Committee met and approved the granting of temporary privileges to Dr. Tun. (App. G, Exhibit H.) This action was pursuant to and was required by Article V, Section 2.C of the By-Laws.

Since the temporary privileges granted to Dr. Tun had restrictions regarding "newborn and cardiovascular anesthesia" (App. G, Exhibit E) which were not granted, pending documentation of training and experience, Dr. Tun was observed on two occasions on July 3, and two on July 7, 1982 in the operating room while he administered anesthesia to children-patients. (App. G, Exhibit H.) Dr. Hattori, an anesthesiologist (Chief of Anesthesiology), observed Dr. Tun on the two procedures on July 7, 1982. (App. G, Exhibit E.) Dr. Hattori recommended that Dr. Tun "should not be doing any pediatric cases in this hospital unless he seeks further training elsewhere." (App. G, Exhibit H). On July 9, 1982, Dr. Stanley Chung, as Chief of Surgery, wrote to Mr. Davi, as president, recommending that Dr. Tun's temporary privileges be terminated based on Dr. Hattori's observation. (App. G, Exhibit J.) Based on these recommendations, Mr. Paul Cook, as executive vice president for Mr. Davi, as president, wrote to Dr. Tun on July 9, 1982, advising him that his temporary privileges in anesthesiology had been terminated, and that Dr. Tun had the right to appeal under Article VII, Section 2 of the By-Laws. (App. G, Exhibit I.) Mr. Cook's action was authorized by Article VII, Section 2 of the By-Laws. (App. G, Exhibit C.)

On July 13, 1982, the Credentials Committee met regarding Dr. Tun's application for privileges and agreed to recommend to the Medical Executive Committee that privileges not be granted. (App. G, Exhibit K.) This meeting was required by Article V, Section 2.B of the By-Laws. (App. G, Exhibit C.) On July 27, 1982, the Medical Executive Committee met and affirmed the recommendation of the Credentials Committee and denied Dr. Tun's application for privileges. (App. G, Exhibit L.) The Medical Executive Committee's actions were also required and authorized by Article V, Section 2.C of the By-Laws. (App. G, Exhibit C.)

On July 28, 1982, Dr. Tun was notified of the Medical Executive Committee's decision by a letter from Mr. Cook. (App. G, Exhibit M.) Dr. Tun was also notified of his appeal rights pursuant to Articles V and VIII of the By-Laws.

On August 1, 1982, Dr. Tun wrote to "Children's Hospital", acknowledging the July 28, 1982 letter, and stated that

> I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your hospitals, at this point of time.

(App. G, Exhibit N.)

On September 30, 1982, Dr. Tun was informed that the Board of Trustees, upon recommendation of the Medical Executive Committee, rejected his application for medical staff membership, which action was taken after receipt of Dr. Tun's August 13, 1982 letter in which he "waived your right to a hearing following notification of the Medical Executive Committee's recommendations." (App. G, Exhibit O.) The Board of Trustee's action was required and authorized by Article V, Section 2.C of the By-Laws, which requires that an adverse recommendation of the Medical Executive Committee be forwarded to the Board of Trustees either after the applicant has exercised his right of appeal (for hearing by an Ad Hoc Committee of the Medical Staff pursuant to Article VIII, Section 1.A) or he has waived his right to a hearing. In this case, it was assumed that Dr. Tun had waived his right to a hearing by his August 13, 1982 letter, but also no appeal was taken by Dr. Tun.

On October 14, 1982, Mr. Canlas, the attorney for Dr. Tun, wrote to Children's Hospital, stating that Dr. Tun never waived his right to a hearing in his August 13, 1982 letter and that since there was no waiver of a right to a hearing, Dr. Tun merely had not pursued his application for privileges at the hospital. (App. G, Exhibit P.) In paragraph 25 of the Amended Complaint it is claimed that on or about August 13, 1982, Dr. Tun "withdrew his application for privileges." Thus, Dr. Tun's position seems to be that he did not waive his right to an appeal but merely withdrew his application.

On October 20, 1982, Dr. Hattori, as Chief of Anesthesiology at Children's Hospital, provided Queen's Medical Center with a form questionnaire that had been submitted by Queen's regarding Dr. Tun (App. G, Chronology), in which he stated that Dr. Tun was not "ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

On December 20, 1982, Children's Hospital wrote to Dr. Tun, advising him that he was entitled to an appellate review by the Board of Trustees and that he had fifteen days to appeal. (App. G, Exhibit Q.) Dr. Tun did not avail himself of this right to appeal. (App. G, Affidavit of Richard Davi.)

II. REASONS FOR DENYING THE PETITION

This case presents no substantial federal question for this Court. The issues regarding alleged violations of federal antitrust laws and and 42 U.S.C. §1983 are not properly before this Court. The Hawaii Supreme Court's rulings regarding the issues of due process, exhaustion of administrative remedies, and Children's Hospital, et al.'s immunity rest on independent and adequate state grounds and are based on the application of state law to the particular facts in this case. Furthermore, Dr. Tun waived his claims of improper suspension and denial of privileges. There are adequate nonfederal grounds for affirming summary judgment as to Children's Hospital, et al.

A. THE ISSUES REGARDING ALLEGED VIOLATIONS OF 42 U.S.C. §1983 AND FEDERAL ANTITRUST STATUTES ARE NOT PROPERLY BEFORE THIS COURT.

Petitioners appear to attempting to establish the existence of a federal question by contending that the conduct of Children's Hospital, et al. was in violation of 42 U.S.C. §1983 and federal antitrust statutes.

This Court has held that issues which were not pressed or passed upon below were not properly before this Court. Pursuant to the "not pressed or passed upon below" rule, this Court has declined to consider issues not properly raised in the lower courts. *Heath v. Alabama*, 106 S. Ct. 433, 436 (1985); *Illinois v. Gates*, 462 U.S. 213, 222 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, (1981); *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 671 n.2 (1976).

In *Beck v. Washington*, 369 U.S. 541 (1962), petitioner was indicted by a grand jury. Prior to trial, petitioner unsuccessfully attempted to have the indictment set aside. Petitioner was convicted of grand larceny in a state trial court. The state supreme court affirmed the conviction. This Court also affirmed.

On appeal to this Court, petitioner contended that a state statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who are investigated by grand juries. This Court held that the contention was not properly before this Court for the following reasons: (1) Petitioner did not mention the statute or make the equal protection argument at the trial court level when petitioner attacked the indictment, even though it was then apparent that the prosecutor and the trial court viewed petitioner as

outside the scope of the statute; (2) On appeal to the state supreme court, petitioner did not list the contention as an "assignment of error" although the state Rules on Appeal provided that the state supreme court would not consider an alleged error of the trial court "unless the same be definitely pointed out in the 'assignments of error' in appellant's brief"; (3) On appeal to the state supreme court, Petitioner did not argue the contention in his brief, as opposed to merely setting it forth as he did in one sentence of his brief; (4) Petitioner did not make the contention at all in his petitions for rehearing filed after the state supreme court agreed with the trial court's interpretation of the statute to exclude petitioner; (5) Although the opinions of the state supreme court discussed the interpretation of the statute, neither considered the statute in the light of the equal protection argument; (6) The contention was not within the scope of the questions to which the writ of certiorari in the case was specifically limited.

Petitioners herein are pressing the federal antitrust and §1983 issues for the first time in their petition for certiorari. This Court should decline to consider the alleged violations of §1983 and federal antitrust laws because these issues were not pressed and passed upon below. Petitioners' First Amended Complaint alleged violations of "antitrust provisions under federal and state law" without citing any specific statutes (Count X), and also alleged violation of 42 U.S.C. §1983 (Count XI). However, Petitioners did not press these claims in the Circuit Court or Hawaii Supreme Court. Although Children's Hospital, et al.'s Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment encompassed all of the Counts of the Amended Complaint, Petitioners did not raise any opposition on the antitrust or §1983 issues. In granting Children's Hospital, et al.'s Motion for Summary Judgment, the Circuit Court did not specifically rule on the issues of antitrust law and 42 U.S.C. §1983.

On appeal to the Hawaii Supreme Court, Petitioner's Opening Brief did not list the antitrust or §1983 issues in the Statement of Points of Error. Rule 28(b)(4) of the Hawaii Rules of Appellate Procedure (which is printed as Appendix F) provides that points not included in the Statement of Points of Error "will be disregarded, except that the court, at its option, may notice a plain error not presented." Petitioners' Opening Brief did not cite or discuss the antitrust issue. Nor does the Opening Brief discuss the §1983 issue; in

an unrelated discussion of the issue of exhaustion of administrative remedies, the Opening Brief cites a case that involved §1983. The Hawaii Supreme Court's Memorandum Opinion did not specifically rule on the antitrust or §1983 issues. Petitioners' motion for reconsideration of the Hawaii Supreme Court's decision did not raise the antitrust or §1983 issues. This Court should not consider the alleged violations of 42 U.S.C. §1983 and federal antitrust laws, as these issues are not properly before this Court.

B. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF DUE PROCESS RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The due process contentions in the Petition for Writ of Certiorari cite the Fourteenth Amendment to the United States Constitution, as well as the Hawaii Supreme Court's decision in *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972), *cert. denied*, 409 U.S. 1048 (1972), *reh. denied*, 409 U.S. 1131 (1973) (hereinafter "*Silver*"; printed as Appendix H). However, the Hawaii Supreme Court's ruling on the due process issue in this case relied solely on *Silver*. In addition, although Petitioners' First Amended Complaint alleged violations of both the Hawaii Constitution (without specifying which provision) and the Fifth and Fourteenth Amendments to the United States Constitution (Count I), Petitioners did not present any due process arguments in opposition to Children's Hospital, et al.'s Motion for Summary Judgment and did not cite or rely on the Federal Constitution in their appeal to the Hawaii Supreme Court.

Where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, this Court has no jurisdiction if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965); *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917); *Hammond v. Johnston*, 142 U.S. 73, 78 (1891).

In *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, this Court reviewed a case in which both federal and state constitutional issues had been raised. In that case, after a city's airport zoning ordinance was passed, respondents had constructed a toll road parallel to a municipal airport. Petitioners, who operated the airport,

brought an action for injunctive relief and damages, alleging that the toll road was constructed in violation of the ordinance. The trial court refused to grant an injunction but awarded petitioners damages. The state supreme court reversed on the grounds that the ordinance "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation."

This Court initially granted certiorari because it appeared that the case involved the validity of airport zoning regulations under the Fourteenth Amendment of the United States Constitution and presented important questions not previously considered by this Court. However, after considering the state supreme court's decision, this Court dismissed the writ of certiorari as improvidently granted. This Court held that the state supreme court's decision was supported by an independent and adequate state ground.

Examining the decision of the state supreme court, this Court noted that the state supreme court stated the issue for decision as whether the ordinance purported to effect a taking of private property for public use in violation of the state constitution and the Federal Constitution. This Court also noted that in resolving the issues, the state supreme court (1) considered the effect of the state and Federal constitutions separately rather than analyzing them together, (2) quoted from both the state and Federal constitutions, and (3) cited its own state decisions, decisions from other states, and federal decisions. This Court said:

> [N]othing in the [state supreme court's] opinion suggests that its conclusion [as to the first question] flows from a federal rather that a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision. . . . [T]here is no intimation that the [state supreme court's] conclusion [as to the second question] is based less forcefully on the [state constitution] than on the [Federal Constitution].
>
> In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. . . . Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold. (citations omitted)

379 U.S. at 491-93.

In the instant case, the Hawaii Supreme Court's discussion of the due process issue cites only *Silver*. The Memorandum Opinion does not cite any other Hawaii case or cases from other states or any federal decisions. It does not cite the United States or Hawaii Constitutions. (*See* Hawaii Constitution Art. I §4, printed as Appendix C).

Silver established as law in Hawaii that a physician whose hospital privileges are being revoked or who is being denied appointment or reappointment to the medical staff must be afforded procedural due process, including notice and a hearing. This Court declined to review the decision in *Silver*. 409 U.S. 1048; 409 U.S. 1131. The opinion in *Silver* cites both federal and state cases; state law appears to be at least an equal ground of the *Silver* decision. In the instant case, the Hawaii Supreme Court's reliance solely on *Silver* indicates that the ruling regarding due process in this case rests on independent and adequate state grounds. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41, 1043 (1983).

In addition, the due process issue in this case does not concern the validity of *Silver*, but rather, involves the application of *Silver* to the particular facts in this case. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. 440, 441 (1917). The Hawaii Supreme Court considered the record in this case and determined that Children's Hospital, et al. had met the due process requirements of *Silver*, so that summary judgment was properly granted.

C. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The Hawaii Supreme Court properly rejected Dr. Tun's contention that his failure to exhaust his administrative remedies at Children's Hospital was excused because he felt that pursuing any administrative remedy would have been futile.

A physician who has been denied staff privileges at a hospital must first exhaust his administrative remedies before availing himself of the judicial process. *Yarnell v. Sisters of St. Francis Health Services, Inc.*, 446 N.E.2d 359, 363 (Ind. App. 1983); *Eidelson v.*

Archer, 645 P.2d 171, 179 (Alaska 1982); *Garrow v. Elizabeth General Hospital and Dispensary*, 401 A.2d 533, 538 (N.J. 1979). The exhaustion of remedies requirement has been excused where the administrative review process is inadequate or would be futile to the certainty of an adverse decision. *Eidelson v. Archer*, 645 P.2d at 181.

In *Eidelson v. Archer*, 645 P.d 171 and *Bartschi v. Chico Community Memorial Hospital*, 187 Cal. Rptr. 61 (Cal App. 1982), plaintiff physicians failed to exhaust their administrative remedies after denial or suspension of staff privileges. In both cases, it was held that the hospitals were entitled to summary judgment on the grounds that the physicians' failure to exhaust their administrative remedies was not excused.

In *Eidelson v. Archer*, 645 P.2d 171, plaintiff physician was notified in writing that his hospital privileges were summarily suspended and that he had a right to a hearing under the hospital bylaws. Plaintiff requested a hearing, then rescinded the request. The executive committee of the hospital medical staff supported the summary suspension. Plaintiff did not request a hearing on the summary suspension, but filed an action in court against members of the hospital medical staff. Plaintiff declined to appear before the executive committee regarding the investigation. The executive committee voted to permanently suspend plaintiff's hospital privileges. Plaintiff did not request a hearing on the permanent suspension, although he was advised of his right to do so.

Plaintiff brought an action for damages. The state supreme court held that summary judgment should have been granted to defendants because plaintiff failed to exhaust his administrative remedies. The court concluded that the exhaustion of remedies doctrine was applicable to plaintiff's action. The court rejected the plaintiff's argument that his failure to pursue the hospital's remedies was excused because any appeal that could have been taken pursuant to the bylaws would have been futile. The court said:

> In this case, since [plaintiff] did not seek an administrative hearing, we are necessarily forced to speculate as to what would have happened if plaintiff had exercised his right of appeal.
>
> . . . .
>
> Under the bylaws, plaintiff was given an adequate opportunity to appeal his suspension and to present any claims of bias or impartiality. He chose instead to bypass those procedures in order to seek judicial relief. We conclude that [plaintiff] has failed to

> demonstrate that the executive committee was prejudiced against him or that any resort to the appeal process was futile. In short, plaintiff has failed to establish any adequate justification for his failure to exhaust the hopital's remedies. (citations omitted)

645 P.2d at 181, 183.

In the instant case, the Hawaii Supreme Court applied the principles set forth in *Eidelson v. Archer*, 645 P.2d 171, to the facts appearing in the record and determined that Dr. Tun's failure to exhaust the administrative review process at Children's Hospital was not justified. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. at 176 n.8; *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. at 441. The record before the Hawaii Supreme Court was adequate for the Hawaii Supreme Court to make such a determination. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975). Dr. Tun had ample time, but did not even attempt, to conduct discovery between the time the First Amended Complaint was filed and the filing of Children's Hospital, et al.'s Motion for Summary Judgment. Nor did Dr. Tun oppose Children's Hospital, et al.'s Motion for Summary Judgment with an affidavit pursuant to Rule 56(f) of the Hawaii Rules of Civil Procedure (printed as Appendix E; virtually identical to rule 56(f) of the Federal Rules of Civil Procedure). It was not until Dr. Tun's appeal to the Hawaii Supreme Court that he first claimed that he needed to conduct discovery.

The record in this case shows that from the time Children's Hospital received Dr. Tun's application, it followed the By-Laws and offered Dr. Tun all opportunities of a hearing or appeal that were provided for in the By-Laws, and Dr. Tun never requested a hearing or an appeal. The By-laws of Children's Hospital (App. G, Exhibit C) provide a specific procedure for the processing of an application for staff privileges. Dr. Tun, in his application for appointment to the medical staff (App. G, Exhibit D), agreed to abide by the terms of the By-Laws. The staff by-laws of a hospital constitute the terms of a legally binding contract between the hospital and the doctors on its staff. *Miller v. Indiana Hospital*, 419 A.2d 1191, 1193 (Pa. Super. 1980); *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 311 A.2d 634, 645 (Pa. 1973).

The letter of July 9, 1982, which informed Dr. Tun that his privileges were summarily suspended, also advised him of his right to a hearing pursuant to Article VIII, Section 2 of the By-Laws. (*See*

App. G, Exhibit I.) Dr. Tun failed to request a hearing on the summary suspension of his privileges as he was entitled to do.

Dr. Tun was also promptly advised of his rights to a hearing and an appeal at every stage of consideration of his application for privileges. On July 28, 1982, Dr. Tun was notified that the Medical Executive Committee decided to recommend to the Board of Trustees that Dr. Tun's application be rejected and that he again had a right to request a hearing on the Medical Executive Committee's recommendation pursuant to Article V, Section 2 and Article VIII of the By-Laws. (App. G, Exhibit M.) Again, Dr. Tun failed to request a hearing as he was entitled to.

Instead, on August 13, 1982, Dr. Tun wrote a letter which stated that "I don't find it necessary to avail myself of your facilities at this time." (App. G, Exhibit N.) Dr. Tun now claims that this amounted to a withdrawal of his application, rather than a waiver of his right to appeal. (*See* paragraph 25 of the Amended Complaint (R.25).

The Medical Executive Committee's recommendation was then forwarded to the Board of Trustees. On September 29, 1982, Dr. Tun was informed that the Board of Trustees accepted this recommendation. (App. G, Exhibit O.) This action by the Board of Trustees was required and authorized by Article V, Section 2 of the By-Laws, which requires an adverse decision of the Medical Executive Committee to be forwarded to the Board of Trustees.

On December 20, 1982, Children's Hospital again advised Dr. Tun of his right to appeal, stating that the Board would withdraw its prior decisions if Dr. Tun would appeal within fifteen days. (App. G, Exhibit Q.) Dr. Tun did not avail himself of this opportunity to appeal.

Thus, in summary, Dr. Tun was given numerous opportunities to appeal (1) the decision of the summary suspension of his temporary privileges by Mr. Cook's letter of July 9, 1982; (2) the Medical Executive Committee's decision of which Dr. Tun was notified on July 28, 1982; and (3) the decision of the Board of Trustees, of which Dr. Tun was notified on September 29, 1982. Finally, Dr. Tun was again advised of the opportunity to appeal based on the Board of Trustees' December 20, 1982 offer to withdraw its prior decision and allow Dr. Tun to appeal. Dr. Tun failed to appeal from these decisions even though he had a right to do so. The Hawaii Supreme Court pointed out that if Dr. Tun had requested a hearing or appeal, he would have had an opportunity to present his claims of bias and his

version of the incidents in question. There was an adequate factual basis for the Hawaii Supreme Court's ruling that Dr. Tun's failure to pursue his administrative remedies provided in the By-Laws barred him from bringing the action.

D. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF CHILDREN'S HOSPITAL, ET AL.'S IMMUNITY RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The Hawaii Supreme Court considered the facts appearing in the record of this case and properly concluded that under Hawaii Revised Statutes §663-1.7 (printed as Appendix D), Children's Hospital, et al. are immune from the civil liabilities claimed by Petitioners. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. at 176 n.8; *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. at 686; *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968); *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. at 441.

1. CHILDREN'S HOSPITAL, ET AL. ARE IMMUNE FROM DR. TUN'S CLAIMS PURSUANT TO H.R.S. §663-1.7.

H.R.S. §663-1.7 provides immunity for Children's Hospital, et al. Drs. Chung and Shim are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(a) and (b). Children's Hospital, Mr. Davi, and Mr. Cook are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(c).

Drs. Chung and Shim are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(a) and (b). §663-1.7(a) defines "peer review committee" to mean

> A committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or in its hospital.

§663-1.7(b) provides immunity for a member of a peer review committee, in the absence of malice. §663-1.7(b) states:

> There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

In effect, §663-1.7(b) confers a qualified privilege on members of a peer review committee. *Aku v. Lewis*, 52 Haw. 366, 371, 477 P.2d 162, 166 (1970). In the context of qualified privilege, the test of "malice" is the reasonableness of a defendant's actions. *Towse v. State*, 64 Haw. 624, 632-33, 647 P.2d 696, 703 (1982), quoting *Russell v. American Guild of Variety Artists*, 53 Haw. 456, 463 n.4, 497 P.2d 40, 45 n.4 (1972).

Where a defendant acts under a claim of qualified privilege, the plaintiff has the burden of adducing clear and convincing proof that defendant was motivated by malice and not by an otherwise proper purpose. *Runnels v. Okamoto*, 56 Haw. 1, 5-6, 525 P.2d 1125, 1129 (1974); *Medeiros v. Kondo*, 55 Haw. 499, 505, 522 P.2d 1269, 1272 (1974). Summary judgment will be granted where the issue of malice is removed from the case by uncontroverted affidavits and depositions, and the moving party is entitled to judgment as a matter of law. *Runnels v. Okamoto*, 56 Haw. at 6, 525 P.2d at 1129.

Summary judgment as to the issue of malice has been held appropriate in an action brought by a physician whose hospital staff privileges were terminated. In *Campbell v. St. Mary's Hospital*, 252 N.W.2d 581 (Minn. 1977), the court affirmed summary judgment in favor of defendants hospital and Surgical Board, which had terminated plaintiff physician's surgical privileges. The court held that plaintiff had failed to establish malice and thus, under a state statute, individual members of the hospital review board were immune from liability. The court said:

> We are unconvinced from a review of plaintiff's affidavits and the evidence most favorable to his claims that his broad allegations of malice are anything more than unsubstantiated speculation as to the reasons for the revocation of his surgical privileges.

252 N.W.2d at 587.

In the instant case, the Hawaii Supreme Court properly determined that the action of Children's Hospital, et al. in relying on the Chief of Surgery's recommendation comported with the procedure set down in the by-laws. The Court pointed out that if Dr. Tun had requested a hearing, he would have had the opportunity to present evidence and witnesses regarding the accuracy and truth of Dr.

Hattori's report.

The record shows that the actions of Drs. Shim and Chung were authorized by the By-Laws and were reasonable under the circumstances of this case. The actions of Drs. Shim and Chung were based on the observation by Dr. Hattori of two procedures performed by Dr. Tun on July 7, 1982. The entire process of reviewing Dr. Tun's qualifications for privileges in anesthesiology was authorized by the By-Laws. Dr. Tun's temporary privileges were granted pursuant to Article VI of the By-Laws, and he was advised on June 23, 1982 that he had been granted "Temporary Privileges", not including newborn anesthesia and cardiovascular anesthesia, pending receipt of documentation of training and experience in those areas (*see* App. G, Exhibit E). Dr. Tun was provided with Surgical Observer information sheets so that he could be observed in the operating room by qualified members of the hospital staff to document his qualifications for full privileges. Dr. Hattori was "observing" Dr. Tun on July 7, 1982 and as a result of these observations he came to the conclusion that Dr. Tun's temporary privileges should be suspended. Drs. Chung and Shim were members of the Medical Executive Committee. (App. G, Affidavits of Drs. Chung and Shim.) This committee is a peer review committee under H.R.S. §663-1.7(a), and thus Drs. Chung and Shim are entitled to the immunity afforded by H.R.S. §663-1.7 unless they acted with malice.

Dr. Chung's actions were reasonable under the circumstances and were taken in compliance with the By-Laws. Dr. Chung is not an anesthesiologist. Dr. Chung states in his affidavit that after he received an oral report and recommendation from Dr. Hattori, who is an anesthesiologist, about Dr. Tun, he wrote a letter to Mr. Davi, recommending that Dr. Tun's temporary privileges be revoked. The By-Laws provide that clinical privileges may be summarily suspended without a hearing "where it is determined that the life or health of . . . patients would be endangered by continued treatment by the practitioner" and "whenever action must be taken immediately in the best interest of the patient care in the hospital." (By-Laws, Art. VI.2.E and VIII.2.A.) Under Art. VII.2.B of the By-Laws, a physician whose clinical privileges have been summarily suspended is entitled to request a hearing. The record shows that Dr. Tun was advised of his right to a hearing in the same letter that informed him that his temporary clinical privileges were summarily suspended. (App. G, Exhibit I.) If Dr. Tun had requested a hearing,

there would have been an investigation, and Dr. Tun would have had a chance to present his version of the incidents in question. The record shows that Dr. Chung acted in compliance with the By-Laws and without malice. *Runnels v. Okamoto*, 56 Haw. at 6, 525 P.2d at 1129. Dr. Chung is immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7.

Similarly, Dr. Shim is also immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7. Dr. Shim's actions as a member of the Credentials Committee and as Chairman of the Medical Executive Committee, which both recommended rejection of Dr. Tun's application, were taken in compliance with the By-Laws. Dr. Shim, who is not an anesthesiologist, states in his affidavit that the actions of the committees were based on the observations and reports of Dr. Hattori, who is an anesthesiologist. Dr. Shim acted without malice and in the best interest of the safety and welfare of the patients at the hospital. Dr. Tun was repeatedly advised of his right to request a hearing. A hearing would have allowed Dr. Tun to present his version of the incidents, but he failed to request a hearing. Petitioners have the burden of adducing clear and convincing proof that Drs. Shim and Chung were motivated by malice and not by an otherwise proper purpose. *Runnels v. Okamoto*, 56 Haw. at 5-6, 525 P.2d at 1129. In the absence of such proof, summary judgment was properly granted in favor of Drs. Shim and Chung.

Children's Hospital, Mr. Davi, and Mr. Cook are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(c), which provides that there shall be no civil liability for a hospital

> in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society society whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the reponsibility for administering a program of medical assistance in which services are provided by private practitioners.

Mr. Davi and Mr. Cook are not physicians and were not members of the peer review committees at Children's Hospital that made the

decisions to suspend Dr. Tun's temporary privileges and to deny Dr. Tun's application for privileges. Mr. Davi and Mr. Cook simply wrote to Dr. Tun, in compliance with the By-Laws, informing him of the decisions made and advising him of his right to a hearing and an appeal. They simply communicated the conclusions reached by the peer review committees. (*See* App. G, Affidavits of Richard Davi and Paul Cook.) Absent a specific showing of facts to the contrary, summary judgment was properly granted in favor of Children's Hospital, Mr. Davi and Mr. Cook. H.R.C.P., Rule 56(e); *Hui Malama 0 Ko'olau v. Pacarro*, 4 Haw. App. 304, 313, 666 P.2d 177, 183 (1983); *Costa v. Able Distributors Inc.*, 3 Haw. App. 486, 489, 653 P.2d 101, 104 (1982).

Finally, while it is not clear from the Amended Complaint, Dr. Tun may also base some of his libel and slander allegations on the fact that on October 20, 1982, Dr. Hattori as Chief of Anesthesiology sent a form questionnaire relating to Dr. Tun to Queen's. (*See* R.184, Exhibit T.) Dr. Hattori had said that he was not an employee of Children's Hospital (*see* R.184, Affidavit of Dr. Mitsuo Hattori, Exhibit W), but even if he were, this act would be privileged under H.R.S. §663-1.7(c), which affords immunity to a hospital in communicating conclusions reached by peer review committees. Drs. Shim and Chung and Mr. Davi and Mr. Cook were not involved in this communication.

2. **DR. TUN SPECIFICALLY RELEASED CHILDREN'S HOSPITAL, ET AL. FROM LIABILITY IN HIS APPLICATION.**

Dr. Tun, in his application (App. G, Exhibit D) agreed to release all representatives of Children's Hospital and its Medical/Dental staff for acts performed in good faith and without malice in connection with evaluating his application and credentials and qualifications. The specific provision in the application states:

> I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment of the staff or renewal of my staff privileges.

As to Dr. Tun's allegations which may be based on the fact that on October 20, 1982, Dr. Hattori sent a filled-in questionnaire regarding Dr. Tun to Queen's Medical Center (R.184, Exhibit T), this com-

munication was privileged pursuant to §663-1.7(c), as discussed above. However, Dr. Tun, in his application, also specifically authorized the release of information by Children's Hospital to other hospitals regarding Dr. Tun's professional competency. (App. G, Exhibit D.) Additionally, Dr. Tun signed a second authorization for release of information at Queen's Medical Center. (R.184, Exhibit U.) Thus, Dr. Tun himself, on two occasions, signed documents authorizing the release of the information which he now complains was libelous, etc. Children's Hospital, et al. were really not involved in this transmittal, but if they were, then they are protected by the above-described authorizations.

3. **CHILDREN'S HOSPITAL, ET AL. WERE UNDER A STATUTORY DUTY TO REPORT IN WRITING ANY ADVERSE DECISION REGARDING PRIVILEGES PURSUANT TO H.R.S. §663-1.7(d) AND THEREFORE HAVE NO LIABILITY TO PETITIONERS FOR REPORTING TO THE BOARD OF MEDICAL EXAMINERS.**

Petitioners apparently base their claim, in part, on the fact that some Respondents communicated the decision of the Medical Executive Committee and/or Board of Trustees to deny Dr. Tun's application to the Board of Medical Examiners. It is not clear who is supposed to have made this report, but in any event, there is a statutory duty to make such a report pursuant to H.R.S. §663-1.7(d). §663-1.7(d) states, in part:

> The highest level peer review committee of a medical society, hospital, or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee.

E. **DR. TUN WAIVED HIS CLAIMS OF IMPROPER SUSPENSION AND DENIAL OF PRIVILEGES.**

A physician who fails to pursue the administrative process provided by a hospital's bylaws will be deemed to have waived his claim for wrongful suspension or denial of privileges. *Jackson v. Fulton-DeKalb Hospital Authority*, 423 F.Supp. 1000 (N.D. Ga. 1976); *Paine v. Brunswick County Hospital Authority*, 470 F.Supp. 28 (E.D. N.C. 1978).

In *Paine v. Brunswick County Hospital Authority*, 470 F.Supp. 28, plaintiff physician's temporary staff privileges were revoked.

Plaintiff was then notified that her application for privileges was going to be denied and that a hearing was set regarding her privileges. Prior to the hearing date, plaintiff wrote to the hospital that she was formally withdrawing her application for permanent staff privileges at the hospital and was also withdrawing her request for a hearing. The court held that

> [a]s [plaintiff] was notified of the matter pending and chose for herself to withdraw her application and hearing request and not appear and contest, due process requirements have been met.

470 F.Supp. at 32.

In *Jackson v. Fulton-DeKalb Hospital Authority*, 423 F.Supp. 1000, plaintiff physician's surgical privileges at a hospital were suspended. Plaintiff's attorney attended one hearing before the executive committee and part of a second hearing; plaintiff did not attend either hearing. Plaintiff was notified that the executive committee sustained the suspension of plaintiff's surgical privileges and voted to suspend all of plaintiff's medical staff privileges. Plaintiff did not appeal, although he was entitled to. Plaintiff filed an action against the hospital and its officials. Summary judgment for defendants was affirmed. The court held that the physician was not denied due process and said:

> [P]laintiff contends that in any event, his failure to file an appeal should not constitute a waiver of his constitutional rights. . . . In the instant case, however, the plaintiff did not even attend the meeting at which the case was discussed. Plaintiff's lawyer left while the meeting was still in progress but gave no indication that he was in any way protesting the form of the hearing.

423 F.Supp. at 1004.

The record shows that Dr.Tun was repeatedly advised of his right to a hearing or an appeal. On July 9, 1982, Dr. Tun was notified that his temporary privileges in anesthesiology were suspended and that he had a right to request a hearing pursuant to the By-Laws. (App. G, Exhibit I.) On July 28, 1982, Dr. Tun was notified of the Medical Executive Committee's recommendation that his application for staff privileges be denied and was advised that he had a right to request a hearing pursuant to the By-Laws. (App. G, Exhibit M.) On September 30, 1982, Dr. Tun was notified that the Board of Trustees had rejected his application for medical staff membership. (App. G, Exhibit 0.) On December 20, 1982, Dr. Tun was advised that he was entitled to an appellate review by the Board of Trustees and that he

had fifteen days to appeal. (App. G, Exhibit Q.)

It is also evident from the record that, despite notification at each stage of the process, Dr. Tun never requested a hearing or appeal. Dr. Tun apparently claims that his letter of August 13, 1982 amounted to a withdrawal of his application for privileges. (*See* paragraph 25 of the Amended Complaint R.25; App. G, Exhibit N). Dr. Tun's August 13, 1982 letter (App. G, Exhibit N) in no way states that he is withdrawing his application. However, even if it did, all of the decisions except that of the Board of Trustees had already been made by August 13, 1982. The By-Laws (Article V, Section 2) provided that a recommendation of the Medical Executive Committee shall be sent to the Board of Trustees for ratification or rejection. This was a mandatory procedure. Dr. Tun agreed to abide by the By-Laws, and by withdrawing his application (if he in fact did withdraw his application), he cannot prevent the Board of Trustees from performing the duty it was required to perform pursuant to the By-Laws.

Dr. Tun apparently did not intend to appeal any of the decisions made by Mr. Davi as president to suspend Tun's temporary privileges, and the Medical Executive Committee's decisions to recommend to the Board of Trustees to reject Tun's application for privileges. Dr. Tun's attempted withdrawal of his application is merely another way of saying he did not intend to appeal any of these decisions, which he had a right to do under the By-Laws. Whether Dr. Tun withdrew his application, or he decided not to appeal, the fact is that he rejected the administrative avenues offered by Children's Hospital. Dr. Tun has waived his claims of improper suspension and improper denial of privileges.

III. CONCLUSION

This case presents no substantial federal question before this Court. The Hawaii Supreme Court's decision affirming summary judgment as to Children's Hospital, et al. rests on independent and adequate state grounds.

For the foregoing reasons, it is respectfully requested that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October, 1986

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-573

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

CORRECTION TO BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

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Dr. Stanley M.K. Chung

CORRECTION TO BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

The Brief in Opposition of Respondents Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung inadvertently cites the prior version of Hawaii Constitution Art. I §4 (printed as Appendix C to the Brief in Opposition). In 1978, Art. I §4 was renumbered as "Art. I §5" and was amended ("the person's" substituted for "his").

Accordingly, all references in the Brief in Opposition to "Hawaii Constitution Art. I §4" should read "Hawaii Constitution Art. I §5." In addition, the following should be substituted for Appendix C to the Brief in Opposition:

APPENDIX C

HAWAII CONSTITUTION Art. I §5

No person shall be deprived of life, liberty or property without due process of law, nor be denied equal protection of the laws, nor denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. [Ren and am Const Con 1978 and election Nov 7, 1978]

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86-573

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,
Petitioners,
vs.
KAUIKEOLANI CHILDREN'S HOSPITAL,
a Hawaii nonprofit corporation, now
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corporation, et al.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF HAWAII

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

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APPENDIX A
SUPREME COURT OF HAWAII
MEMORANDUM OPINION

NO. 10564

IN THE SUPREME COURT OF THE STATE OF HAWAII

THAN TUN, M.D., AND THIDA SWE TUN,	) CIVIL NO. 84-181
Plaintiffs-Appellants,	) APPEAL FROM THE:) 1) ORDER GRANTING) MOTION FOR SUMMARY
v.	) JUDGMENT AND) DIRECTING ENTRY OF
KAUIKEOLANI CHILDREN'S HOSPITAL, A Hawaii non-profit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) FINAL JUDGMENT FILED) MARCH 6, 1985,) 2) JUDGMENT FILED) MARCH 6, 1985,) 3) AMENDED ORDER) GRANTING MOTION FOR) SUMMARY JUDGMENT) AND DIRECTING ENTRY
and	) OF FINAL JUDGMENT) FILED APRIL 2, 1985 and
THE QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) 4) AMENDED JUDGMENT) FILED APRIL 2, 1985)
Defendants.	) FIRST CIRCUIT COURT)
	) HONORABLE EDWIN H. HONDA Judge

MEMORANDUM OPINION

Plaintiffs-appellants Dr. Than Tun and Thida Swe Tun appeal from a grant of summary judgment in favor of defendants-appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center (Kapiolani), Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Dr. Mitsuo Hattori, Queen's Medical Center, Dr. John Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague. We affirm in part and reverse in part.

I.

Dr. Tun applied for anesthesiology privileges at Kapiolani. Initially, he was granted temporary privileges but those privileges were terminated based on Dr. Hattori's observation of Dr. Tun's performance in the operating room. Dr. Chung, Chief of Surgery, relied on Dr. Hattori's observations and recommended the termination to Mr. Davi, President. Dr. Hattori, Chief of Anesthesiology, had observed Dr. Tun on two occasions and believed his performance to be unsatisfactory. Dr. Tun, stating that he did not desire to use the facilities withdrew his application without pursuing the administrative appeal process as provided under the Medical Staff By-Laws. Kapiolani formally denied Dr. Tun's application, taking the view that Dr. Tun's letter of withdrawal was a waiver of his right to an appeal hearing.

Subsequent to the denial of staff privileges to Dr. Tun by Kapiolani, Dr. Tun applied to Queen's Medical Center for anesthesiology privileges. On the application form, Dr. Tun answered "No" to the question of whether his privileges had ever been revoked, denied or suspended at any other hospital. Dr. Hattori, in responding to Queen's questionnaire, stated that, "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

Queen's Credentials Committee recommended that Dr. Tun's application for privileges be denied. The Medical Executive Committee affirmed the recommendation and notified Dr. Tun of the denial based on, inter alia, unethical conduct in answering the question improperly. Dr. Tun was advised that he had a right to request an informal hearing before the Medical Executive Committee and a full hearing before the Board of Directors after the hearing and decision by the Medical Executive Committee. A hearing before the Medical Executive Committee was scheduled at the request of Dr. Tun but Dr. Tun failed to attend the hearing. Instead, Dr. Tun commenced action for damages in the circuit court.

Appellants sued Queen's, Kapiolani, and their respective doctors and administrators for monetary damages based on a multiple causes of action, summarized as follows: libel, slander and defamation; improper revocation of privileges; violation of due process; conspiracy to deny Dr. Tun his constitutional rights and to restrict interstate business; intentional infliction of emotional distress; malicious prosecution and abuse of process; breach and tortious breach of contract; negligence; unfair and deceptive trade practices; loss on consortium;

promissory estoppel; and intentional, malicious, wanton and willful acts of defendants. The trial court granted summary judgment in favor of defendants based on Dr. Tun's failure to exhaust the hospitals' administrative remedies. We affirm as to all defendants except Dr. Hattori.

II.

Appellants assert that Dr. Tun is excused from exhausting the available administrative remedies for the following reasons: (1) the administrative review would have been futile and would have caused undue hardship; (2) Dr. Tun was deprived of procedural due process; (3) appellants may sue the peer review committee for damages without exhausting the administrative remedies; and (4) the defendants acted with malice against Dr. Tun under Hawaii Revised Statutes (HRS) §663-1.7(b).[1]

III.

Was Dr. Tun bound to exhaust the administrative remedies available to him? And if so, would the pursuit of administrative appeals have been an act of futility or cause undue hardship?

It is generally accepted that a physician must exhaust available internal remedies afforded by the hospital before bringing a suit for damages. *Westlake Community Hospital v. Superior Court of Los Angeles County*, 17 Cal. 3d. 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976); *Eidelson v. Archer*, 645 P.2d 171 (Alaska 1982). However, the exhaustion of remedies requirement has been excused where the administrative review process is either inadequate or would be futile to the certainty of an adverse decision. *Eidelson*, *supra*, at 181; *see also Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975).

Appellants contend that the available administrative appeal procedure would have been futile since Dr. Tun felt that Queen's had made a prejudgment, and that Queen's did not conduct a sufficient investigation prior to reducing his privileges. It was also apparent that

---

[1]The pertinent part of §663-1.7(b) reads:

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

Dr. Tun's and Queen's interpretation of the application differed. These contentions by appellants are issues which should have been raised and argued before the Medical Executive Committee and ultimately before the Board of Directors if necessary. Moreover, appellants failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's had already prejudged Dr. Tun. Dr. Tun's personal inclination or views are insufficient grounds to support appellants' contentions.

As to Kapiolani, here again appellants fail to give any specific grounds as to why the administrative appeal process would have been futile or would have put Dr. Tun in undue hardship to pursue his administrative appeal. Instead, appellants asserted that since Dr. Tun withdrew his application, pursuing any administrative remedy was unnecessary. Yet, the record shows that Dr. Tun "withdrew his application" after notice of the termination of his temporary privileges. Therefore, any disagreement with Kapiolani should have been presented at a hearing before an Ad Hoc Committee of the medical staff. Dr. Tun failed to avail himself of this hearing as provided in the By-Laws.

IV.

Was Dr. Tun denied his right to procedural due process?

The decision of a hospital board will be upheld unless the doctor involved was denied procedural due process or the hospital abused its discretion. *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972). Procedural due process requires that a doctor whose privileges are being revoked or who is being denied appointment or reappointment to the medical staff be given an opportunity to appeal the denial at at hearing. Further, the hearing must comport with certain procedural safeguards such as timely notice of hearing and a statement specifying the reasons for the initial decision of the hospital board. *Silver* at 485, 497 P.2d at 571.

Appellants claim that Dr. Tun was denied due process when Kapiolani terminated his temporary privileges without written charges or a proper hearing, but the record indicates that the notification by Kapiolani comported with the procedural due process requirements in *Silver*. Kapiolani notified Dr. Tun that the termination of his temporary privileges was due to two unacceptable anesthetic cases performed by him at the hospital and observed by Dr. Hattori. The notice informed Dr. Tun of his right to request a hearing within

thirty days, and that failure to request a hearing would constitute a waiver of his right to do so.

Although Dr. Tun's privileges were actually terminated prior to hearing, the hospital took such action "in the best interest of patient care." We do not consider this an abuse of discretion by Kapiolani whose physicians and supervisors were in the best position to make a decision for the benefit of their patients.

As to Queen's, appellants claim that Dr. Tun's privileges were denied on the basis of his application rather than his competency. This is a matter within the hospital's discretion. Further, the record shows that Queen's denied Dr. Tun's privileges due to serious questions regarding his ethical conduct. Queen's informed Dr. Tun that they concluded that he had falsified information and specified the ground upon which they had based their conclusion. Queen's further informed Dr. Tun of his right to request a hearing with the Medical Executive Committee and the right to review his own staff file. We find no denial of due process or abuse of discretion here.

V.

Appellants contend that Kapiolani and its named defendants acted with malice. Under HRS §663-1.7(b), Kapiolani and the members of its peer review committee are not liable for acts done in furtherance of the committee's purpose and without malice. This section confers a qualified privilege on the committee members, placing the burden on the plaintiff to adduce clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose. *See Aku v. Lewis*, 52 Haw. 366, 477 P.2d 162 (1970). The by-laws provide similar immunity, excepting acts done in malice and without good faith.

Appellants also contend that Kapiolani failed to investigate the accuracy of Dr. Hattori's report. The action of Kapiolani is relying on the Chief of Surgery's recommendation comports with procedure set down in the by-laws. The accuracy and truth of the report by Dr. Hattori were issues appropriate for an appeal hearing. At the hearing, Dr. Tun would have had the opportunity to present evidence and witnesses in his favor.

Based on the record we find no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees. We conclude that under HRS §663.7(b) [sic] Kapiolani and its named defendants are immune from the civil liabilities claimed by appellants.

VI.

Appellants further contend that Dr. Hattori was motivated by anger and acted with malice in writing a false report. Dr. Hattori is not a member of Kapiolani's peer review committee and therefore he does not fall under HRS §663-1.7(b). We, therefore, hold that the trial court committed error in granting summary judgment in favor of Dr. Hattori solely on the basis of appellants' failure to exhaust the administrative remedies available to them. We remand for proceedings anew on the causes of action claimed by the appellants against Dr. Hattori.

VII.

Appellants' other claims are without merit.

Affirmed in part, reversed in part, and remanded for proceeding not inconsistent with this opinion.

DATED: Honolulu, Hawaii, June 17, 1986.

/S/ Herman Lum
/S/ Edward H. Nakamura
/S/ Frank D. Padgett
/S/ Yoshimi Hayashi
/S/ James H. Wakatsuki

APPENDIX B
JUDGMENT ON APPEAL

NO. 10564

IN THE SUPREME COURT OF THE STATE OF HAWAII

THAN TUN, M.D., AND THIDA SWE TUN,	) CIVIL NO. 84-0181
Plaintiffs-Appellants,	) APPEAL FROM THE:) 1) ORDER GRANTING) MOTION FOR SUMMARY
v.	) JUDGMENT AND) DIRECTING ENTRY OF
KAUIKEOLANI CHILDREN'S HOSPITAL, A Hawaii non-profit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	) FINAL JUDGMENT FILED) MARCH 6, 1985,) 2) JUDGMENT FILED) MARCH 6, 1985,) 3) AMENDED ORDER) GRANTING MOTION FOR) SUMMARY JUDGMENT) AND DIRECTING ENTRY
Defendants-Appellees,	) OF FINAL JUDGMENT) FILED APRIL 2, 1985 and
and	) 4) AMENDED JUDGMENT) FILED APRIL 2, 1985
THE QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al.,	)) FIRST CIRCUIT COURT)
Defendants.	) THE HONORABLE) EDWIN H. HONDA) Judge

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii filed June 17, 1986, the judgments appealed from are affirmed as to Defendants-Appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Queen's Medical Center, Dr. John Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague, and reversed and remanded for further proceedings against Defendant-Appellee Dr. Mitsuo Hattori."

DATED: Honolulu, Hawaii, August 19, 1986.

BY THE COURT:
CLERK

APPROVED:
/S/ James H. Wakatsuki
JUSTICE

APPENDIX C
HAWAII CONSTITUTION Art. I §4

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.

APPENDIX D
HAWAII REVISED STATUTES §663-1.7
HAWAII REVISED STATUTES (1976 Replacement)

§663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, the membership of which comprises a majority of the people engaged in the profession or occupation in the area which it serves and a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability for any professional society or hospital in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profession of occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee. [L1970, c60 §1; am L 1975, c 170, §2; am L 1976, c 219, §18]

HAWAII REVISED STATUTES (1983 Supplement)

§663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical or administrative staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or area of specialty practice, or in its hospital.

***

(d) The final peer review committee of a medical society, hospital, or other health care facility shall report in writing every adverse decision made by it to the department of commerce and consumer affairs. The report shall be filed within thirty business days following an adverse decision. The report shall contain information on the nature of the action, its date, the reasons for, and the circumstances surrounding the action; provided that specific patient identifiers shall be expunged. If a potential adverse decision was superseded by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state. The department shall prescribe forms for the submission of reports required by this section. Failure to comply with this subsection shall be a violation punishable by a fine not less than $100 for each member of the committee. [am L 1982, c 227, §6; am L 1983, c231, §1; am L 1984, c 168, §16]

APPENDIX E
RULE 56, Hawaii Rules of Civil Procedure

Rule 56. SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavit; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. (Amended May 15, 1972, effective July 1, 1972)

APPENDIX F
Rule 28, Hawaii Rules of Appellate Procedure

Rule 28. BRIEFS.

(a) **Format and Service.** All briefs shall conform with Rule 32 and be accompanied by proof service of two copies on each party to the appeal. Except after leave granted, the clerk will not receive an opening or answering brief of more than 35 typewritten pages, or a reply brief of more than 10 typewritten pages, exclusive of indices, appendices and statements of related cases, or any brief which does not conform with Rule 32.

(b) **Opening Brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

(1) A subject index of the matter in the brief with page references, and a table of authorities listing the cases, alphabetically arranged (with citation to both the official reports and national reporter systems), text books, articles, statutes, treatises, regulations and rules cited, with references to the pages in the brief where they are cited.

(2) A statement showing the grounds on which the jurisdiction of the court has been invoked. It shall include a showing that the appeal is timely by references to the record with dates. In a criminal case it shall indicate the nature of the offense and the statute under which the defendant was convicted, the sentence imposed, and whether the defendant has been released on bail or on his own recognizance.

(3) A concise statement of the case, containing the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of trial proceedings. In presenting those material facts all supporting and contradictory evidence shall be presented in summary fashion and with appropriate record references. There shall be appended to the brief a copy of the findings of fact and conclusions of law, or opinion or decision, if any, unless otherwise ordered by the court.

(4) A concise statement of the points on which appellant intends rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable the following:

(A) When the point involves the admission or rejection of evi-

dence, there shall be included a quotation of the ground urged at the trial for the objection and full substance of the evidence admitted or rejected.

(B) When the point involves the charge of the court, there shall be set out the specific words of the part referred to, whether it be instructions given or refused, together with the objections urged at the trial.

(C) When the point involves findings or conclusions of the court below, those urged as error shall be quoted in their entirely and there shall be included a statement explaining why the findings of fact or conclusions of law are alleged to be erroneous.

(D) When the point involves a ruling upon the report of a master, there shall be included a statement of the objection to the report and a summary of the action taken below.

Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented.

(5) A brief separate section entitled "Standard of Review," setting forth the applicable standard or standards of review to be applied in reviewing the respective orders or decisions of the trial court or agency alleged to be erroneous.

(6) A short and concise statement of the question or questions presented for decision by the points specified under (b)(4) of this rule, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented in accordance with this paragraph will be disregarded, except that the court, at its option, may notice a plain error not presented.

(7) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon. The argument may be preceded by a concise summary.

(8) Relevant parts of the constitutional provisions, statutes, ordinances, treatises, regulations, or rules involved, setting them out verbatim. If lengthy they may be cited and their pertinent text set out in the appendix.

(9) Parts of the record material to the questions presented may be included in the appendix. Anything that is not part of the record shall be appended to the brief.

(10) A conclusion, specifying with particularity the relief sought.

(11) Statement of Related Cases. A brief statement identifying any related case known to be pending in the Hawaii courts or agencies. The statement shall include the following: case caption, docket number and the nature of the relationship. Cases are deemed related if they:

(A) arise out of the same or consolidated cases in the trial court or agency;

(B) involve a case that was previously heard in this court;

(C) involve the same parties;

(D) involve the same or closely related issues;

(E) involve the same basic transaction or event; or

(F) have any other similarities of which you think the court should be aware.

The statement shall be presented on a separate page entitled "Statement of Related Cases." The statement shall be the last page in the brief. If no other cases are deemed related, a single statement to this effect shall be provided. If a party identifies a case as related, no other party need duplicate the listing in that party's brief. If a party learns of a related case after filing the initial brief, that party shall promptly file a statement.

(c) **Answering Brief.** Within 40 days after service of appellant's opening brief, the appellee shall file an answering brief. The brief shall be of like character as that required of the appellant except that no statement of points shall be required, and no other section is required unless the section presented by the appellant is controverted. The answering brief shall contain a counterstatement of each section except points, unless the appellee is satisfied with the section included in the appellant's brief.

(d) **Reply Brief.** Within 10 days after service of appellee's answering brief, appellant may file a reply brief. The reply brief shall be confined to matter presented in the answering brief. If no reply brief is to be filed, appellant shall notify the clerk and appellee in writing of that decision prior to expiration of the time for filing the reply brief.

(e) **Briefs on Reserved Questions.** In cases in which a single question has been reserved, the party maintaining the affirmative shall, for the purpose of this rule, be regarded as the appellant and the party opposing the question the appellee. So also where there are several questions and one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some and the negative as to others, the

plaintiff shall be regarded as the appellant and the defendant as the appellee, unless, upon application to the court, an order specifying otherwise is issued by the court.

(f) **Briefs in Original Cases.** This rule shall apply to cases brought originally in the Hawaii Supreme Court, unless otherwise ordered by the court. For the purpose of this rule, when a case is brought originally in this court, the party who would be regarded as the plaintiff or petitioner if the matter were instituted in a lower court shall be regarded as the appellant, and the opposing party the appellee.

(g) **Brief of Amicus Curiae.** A brief of an amicus may be filed only by order of the court which shall fix the time for filing the same and any response thereto. The court may allow or disallow the filing of such brief with or without a hearing. All briefs of an amicus curiae shall comply with the applicable provisions of Rule 28. The Attorney General may file a brief amicus curiae without order of the court in all cases where the constitutionality of any statute of the State of Hawaii is drawn in question.

(Amended February 20, 1985, effective February 20, 1985.)

APPENDIX G

Excerpts from attachments to Children's Hospital et al.'s Motion for Summary Judgment

LIBKUMAN, VENTURA
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) MOTION FOR SUMMARY
	) JUDGMENT;
vs.	) MEMORANDUM IN
	) SUPPORT OF MOTION FOR
KAPIOLANI CHILDREN'S	) SUMMARY JUDGMENT;
MEDICAL CENTER, et al.,	) AFFIDAVIT OF RICHARD
	) DAVI; AFFIDAVIT OF PAUL
Defendants.	) E. COOK; AFFIDAVIT OF
	) WALTON K.T. SHIM, M.D.;
	) AFFIDAVIT OF STANLEY
	M.K. CHUNG, M.D.;
	AFFIDAVIT OF FRANCES A.
	HALLONQUIST; EXHIBITS
	A-W; NOTICE OF MOTION
	FOR SUMMARY
	JUDGMENT AND
	CERTIFICATE OF SERVICE

DATE: January 29, 1985
TIME: 9:00 a.m.
JUDGE: EDWIN HONDA

MOTION FOR SUMMARY JUDGMENT

Come now, Defendants Kauikeolani Children's Hospital

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CHRONOLOGY OF EVENTS

Exhibit A — *April 5, 1977:* Dr. Tun submits his application for privileges (*see* Exhibit A attached hereto). On July 7, 1977, additional documents were submitted to complete the application.

Exhibit B — *October 6, 1977:* Dr. Tun is notified that the Board of Trustees, upon recommendation of the Medical Executive Committee, has granted Probationary Privileges in the practice of Anesthesiology, Department of Special Clinics, Active Staff. Also, Tun is advised that he can apply for termination of his probationary status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients, private or staff, cared for in the hospital by Dr. Tun during his period of probation, including operating room evaluation of five cases by at least three different observers. (*See* Exhibit B attached hereto.)

Exhibit C — *October 16, 1977:* Tun's probationary privileges were granted pursuant to Article V of the By-Laws, Rules and Regulations of the Medical and Dental Staff, a copy of which is attached hereto as Exhibit C.

Exhibit D — *June 15, 1982:* Dr. Tun submits second application for appointment to Medical Staff (for privileges) (*see* Exhibit D). This would be done pursuant to Article V of the By-Laws. (*See* Exhibit C.)

Exhibit E — *June 23, 1982:* Dr. Tun is informed that temporary privileges have been granted effective immediately through approximately early September, but that "newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas." (*See* Exhibit E.) Dr. Tun was provided with Surgical Observer information sheets. The various departments

Exhibit F — of the hospital were also advised that Dr. Tun had been granted these privileges (*see* Exhibit F).

The temporary privileges were granted pursuant to Article VI of the By-Laws, a copy of which is attached as Exhibit C.

Exhibit G — *July 2, 1982:* The Surgical Executive Committee met and approved the granting of temporary privileges

to Dr. Tun. *See* Exhibit G attached hereto.

The medical Executive Committee again acted pursuant to Article V of the By-Laws (*see* Exhibit C).

Exhibit H — *July 3 and 7, 1982:* Dr. Tun was "observed" in the operating room administering anesthesia on two occasions on July 3 and two occasions on July 7, 1982. A summary of these observations is attached as Exhibit H, which is in the file of Children's Hospital. The two observations on July 7, 1982 by Dr. Hattori led to the termination of Dr. Tun's "temporary privilages".

Exhibit I — *July 9, 1982:* Dr. Tun is advised by Children's Hospital that his temporary privileges in Anesthesiology were terminated pursuant to a recommendation by the Chief of Surgery (*see* Exhibit I). Dr. Tun was advised of his right to appeal pursuant to Article VII, Section 2, a copy of which is attached hereto as Exhibit C.

This action was authorized by Article VII, Section 2, which provides that the Chief-of-Staff or the chief of a department or the Chief Executive Officer, etc. can summarily suspend all or any portion of clinical privileges of a doctor. Article VII, Section 2 also provides that the doctor can request that the Medical Executive Committee hold a hearing in accordance with Article VIII.

Also, on July 9, 1982, Dr. Stanley M.K. Chung, Chief of Surgery, wrote to Mr. Davi, as president of Children's Hospital, recommending that Dr. Tun's privileges be terminated based on Dr. Hattori's "observations" of Dr. Tun's performance in administering anesthesia to two patients on July 7. A copy of Dr. Chung's letter is attached as Exhibit J.

Exhibit J

Exhibit K — *July 13, 1982:* The Credentials Committee met on Dr. Tun's application for provisional privileges and agreed to recommend (to the Medical Executive Committee) that privileges not be granted. (*See* Exhibit K.)

This Credentials Committee meeting was pursuant to Article V, Section 2 of the by-Laws (*see* Exhibit C).

Exhibit L — *July 27, 1982:* The Medical Executive Committee met and agreed to reject Dr. Tun's application for professional privileges in anesthesia (*see* Exhibit C).

Exhibit M — *July 28, 1982:* Dr. Tun is notified of the Medical Executive Committee's decision to recommend to the Board of Trustees that his application to be rejected. Dr. Tun is also advised of his right to request a hearing before an Ad Hoc committee of the Medical Staff within 15 days pursuant to Article V, Section 2 and Article VIII of the By-Laws. (*See* Exhibit M.)

This notice was sent pursuant to Article V, Section 2 of the By-Laws.

Exhibit N — *August 13, 1982:* Dr. Tun writes to "Children's Hospital" acknowledging the July 28, 1982 letter and states that he has sufficient work in other hospitals "that I don't find it necessary to avail myself of your facilities at this point of time." (*See* Exhibit N.)

Exhibit O — *September 30, 1982:* Dr. Tun is advised by Children's Hospital that the Board of Trustees, upon recommendation of the Medical Executive Committee, rejected his application and that this action was taken following receipt of Dr. Tun's August 13, 1982 letter in which he waived his right to a hearing. (*See* Exhibit O.)

The Board of Trustees' action was pursuant to Article V, Section C.2.c, and Section V.D. of the By-Laws (*see* Exhibit C attached hereto).

Exhibit P — *October 14, 1982:* Dr. Tun's attorney, Mr. Canlas, writes to Children's Hospital, claiming Dr. Tun never waived his right to a hearing in his August 13, 1982 letter, and that since there was no waiver of a right to a hearing, and since Dr. Tun had not pursued his application with the hospital, there has never been a rejection of his application by the Medical Executive Committee (*see* Exhibit P).

Exhibit T — *October 20, 1982:* Dr. Hattori, as Chief of Anesthesiology of Children's Hospital, sent a form questionnaire provided by Queen's in which he stated that he did not believe that Dr. Tun "is ready to give anesthesia for Children's unless he seeks further training in the field of pediatric anesthesiology" (*see* Exhibit T. attached hereto). This communication is privileged pursuant to H.R.S. §663-1.7(c).

Exhibit Q — *December 20, 1982:* Children's Hospital advises Dr. Tun that he is entitled to an appellate review by the Board of Directors in accordance with Article V, Section 2, D-1, b-2 of the By-Laws; that the Board will withdraw its prior decision to permit appellate review and a new decision by the Board; that Dr. Tun would have fifteen days following receipt of "this notice" to submit a written request for such an appellate review; and that failure to request the review would constitute a waiver. (*See* Exhibit Q.)

Exhibit R — *January 3, 1983:* Mr. Canlas (attorney for Dr. Tun) writes to Children's Hospital acknowledging the December 20 letter and says he wants until January ~~14~~ to review the matter. (Exhibit R.)

Exhibit S — *March 10, 1983:* Children's Hospital again advises Dr. Tun that the Board of Trustees has upheld the Medical Executive Committee's prior recommendation (to not grant privileges) and that this action was taken following non-receipt of a written request for appellate review. (*See* Exhibit S.)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs	) AFFIDAVIT OF
	) RICHARD DAVI
vs.	)
	)
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF RICHARD DAVI

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

RICHARD DAVI, being first duly sworn on oath deposes and states:

1. In 1982 and 1983, Affiant was the President of Kauikeolani Children's Hospital (hereafter "Children's Hospital").

2. On June 15, 1982, Dr. Than Tun submitted his application for privileges at Children's, and on June 28, 1982, he was granted temporary privileges, which temporary privileges were confirmed by a meeting of the Surgical Executive Committee on July 2, 1982. The temporary privileges had restrictions in that Dr. Tun could not administer anesthesia to newborn and cardiovascular patients until he submitted documentation of training and experience in these areas. Dr. Tun was to be observed while administering anesthesia in at least two additional cases before he would be considered for permanent privileges.

3. Dr. Tun was observed by Dr. Mitsuo Hattori during two anesthesia procedures performed by Dr. Tun on July 7, 1982. Dr. Hattori was Chief of Anesthesia at Children's Hospital. As a result of these observations, Affiant received a July 9, 1982 letter from Dr. Stanley M.K. Chung, recommending that Dr. Tun's temporary privileges be terminated. (*See* Exhibit J attached to Motion for Summary Judgment filed herewith by Children's Hospital.) On July 9, 1982, Mr. Paul Cook wrote to Dr. Tun, advising him that his

temporary privileges had been revoked. Mr. Cook's actions were authorized by Article VII, Section 2 of the By-Laws. Dr. Tun was advised of his right to appeal this action. This action taken by Mr. Cook with Affiant's consent was based on the recommendation of Dr. Stanley M.K. Chung, Chief of Surgery, and Dr. Chung's recommendation was based on the recommendation of Dr. Mitsuo Hattori, Chief of Anesthesiology, after Dr. Hattori observed Dr. Tun in two cases on July 7, 1982.

4. On July 13, 1982 the Credentials Committee, which is comprised of independent physicians with staff privileges at Children's Hospital, met and decided to recommend against the granting of privileges to Dr. Tun. On July 27, 1982 the Medical Executive Committee, which is also comprised of physicians with privileges at Children's Hospital, met and agreed to reject Dr. Tun's application for privileges. Neither Affiant nor Mr. Paul Cook is a member of the Credentials Committee or the Medical Executive Committee. These committees are comprised of physicians with privileges at Children's Hospital who have the expertise to pass on the qualifications of any physician applying for privileges.

5. On July 28, 1982, Mr. Paul E. Cook advised Dr. Tun of the decision of the Medical Executive Committee and of Dr. Tun's rights of appeal. On August 13, 1982, Dr. Tun wrote a letter to Children's Hospital stating, "I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your facilities, at this point of time." On September 30, 1982, Dr. Tun was advised in writing by Affiant that the Board of Trustees, upon recommendation of the Medical Executive Committee, had rejected his application; and after correspondence with Dr. Tun's attorney, Dr. Tun was advised in writing on December 20, 1982, that he would be given another chance for appellate review by the Board of Trustees if he so desired. On January 3, 1983, a letter was received from Dr. Tun's attorney, requesting additional time to consider this offer, but neither Dr. Tun nor his attorney ever requested a review of Children's Hospital's denial of Dr. Tun's application for privileges.

6. Affiant at all times in this matter acted pursuant to the By-Laws of Children's Hospital and afforded Dr. Tun all of the rights of review and appeal that are afforded by the By-Laws, and in fact on December 20, 1982, afforded Dr. Tun a right of review by the Board of Trustees that was in addition to the rights of review and appeal provided in the By-Laws. Dr. Tun never availed himself of any right

of review of appeal provided in the By-Laws. Affiant, in all of his dealings with Dr. Tun, acted without malice or prejudice towards Dr. Tun; and Affiant attempted to, and did, advise Dr. Tun of all rights of appeal and review that he was entitled to under the By-Laws. Affiant is not a medical doctor and must rely upon the medical expertise of doctors who have staff privileges at Children's Hospital as to the competency of physicians applying for privileges at Children's Hospital. In the case of Dr. Tun, Dr. Mitsuo Hattori, Chief of Anesthesia, recommended to Dr. Stanley M.K. Chung, Chief of Surgery, that Dr. Tun's temporary privileges be revoked after Dr. Hattori observed Dr. Tun during two procedures on July 7, 1982. Dr. Tun had the right to have this decision reviewed and did not do so; and he also had the right to have the decision of the Medical Executive Committee and the Board of Trustees reviewed, and again chose not to do so. Dr. Tun was then on December 20, 1982, given another chance for appellate review by the Board of Trustees which is not provided in the By-Laws, and again he did not request this review.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 24, 1984.

/S/ Richard Davi

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) AFFIDAVIT OF
	) PAUL E. COOK
vs.	)
	)
KAPIOLANI CHILDREN'S	)
MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF PAUL E. COOK

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

PAUL E. COOK, being first duly sworn on oath deposes and states:

1. In 1982 and 1983, Affiant was the Executive Vice President of Kauikeolani Children's Hospital (hereafter "Children's Hospital").

2. Affiant has read the Affidavit of Richard Davi and the Chronology of Events attached to the Motion for Summary Judgment filed herewith by Children's Hospital and agrees with the facts set forth in said documents.

3. As the Executive Vice President, Affiant attempted to comply with the By-Laws of the Children's Hospital in every respect with regard to Dr. Tun's application for privileges, and the cancellation of Dr. Tun's temporary privileges and denial of his application for privileges.

4. Affiant believes that Dr. Tun was afforded all rights of review and appeal provided for in the By-Laws of Children's Hospital, and Dr. Tun did not avail himself of any of these rights of review or appeal.

5. Affiant at all times acted without malice or prejudice with regard to Dr. Tun and his application for privileges, the suspension of his temporary privileges and denial of his application for privileges;

and Affiant attempted to treat Dr. Tun fairly, affording him every right of review and appeal provided for in the By-Laws.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 26, 1984.

/S/Paul E. Cook

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
Plaintiffs,	) AFFIDAVIT OF
	) STANLEY M.K. CHUNG,
vs.	) M.D.
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
Defendants.	)

AFFIDAVIT OF STANLEY M.K. CHUNG, M.D.

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

STANLEY M.K. CHUNG, M.D., being first duly sworn on oath deposes and states:

1. At all times mentioned herein Affiant was an independent physician with staff privileges at Kauikeolani Children's Hospital (hereafter "Children's Hospital"), and acted as the Chief of Surgery at Children's Hospital.

2. On or about July 8, 1982, Affiant received an oral report from Dr. Mitsuo Hattori, Chief of Anesthesiology at Children's Hospital, regarding Dr. Than Tun. Dr. Hattori described two procedures that he had observed on July 7, 1982, in which Dr. Tun administered anesthesia to patients at Children's Hospital. As a result of events which took place during those procedures which involved endangering the well-being of the patients, Dr. Hattori was of the opinion that Dr. Tun's temporary privileges should be revoked. Affiant then on July 9, 1982, wrote to Mr. Richard Davi, recommending that Dr. Tun's temporary privileges be revoked and that no further privileges be granted. (*See* Exhibit J attached to Motion for Summary Judgment filed herewith by Children's Hospital.)

3. On July 27, 1982, Affiant was a member of the Medical Executive Committee. This committee decided to reject Dr. Tun's application for privileges based on the recommendation of Dr. Hattori to Affiant.

4. All of Affiant's actions in this case were done without malice or prejudice towards Dr. Tun, and were done solely in the best interests and for the safety of patients at the Children's Hospital, and were done pursuant to the By-Laws of the Children's Hospital.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, December 20, 1984.

/S/Stanley M.K. Chung, M.D.

[Jurat]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

THAN TUN, M.D., et al.,	) CIVIL NO. 84-0181
	)
Plaintiffs,	) AFFIDAVIT OF
	) WALTON SHIM, M.D.
vs.	)
	)
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	)
	)
Defendants.	)
	)
	)

AFFIDAVIT OF WALTON SHIM, M.D.

STATE OF HAWAII)
:SS.
CITY AND COUNTY OF HONOLULU)

WALTON SHIM, M.D., being first duly sworn on oath deposes and states:

1. At all times mentioned herein, he was an independent physician with privileges at Kapiolani Children's Hospital (hereafter "Children's Hospital") and acted as the Chief of Staff at Children's Hospital.

2. On July 13, 1982, Affiant was a member of the Credentials committee of Children's Hospital, which committee met and agreed to recommend to the Medical Executive Committee that the application of Dr. Tun for privileges be denied. On July 27, 1982, Affiant was the Chairman of the Medical Executive Committee, which committee decided to reject Dr. Tun's application for privileges in anesthesiology. Both the actions of the Credentials Committee and the Medical Executive Committee were based on Dr. Tun's performance on July 7, 1982, in administering anesthesia to two patients at Children's Hospital, which procedures were observed and reported by Dr. Mitsuo Hattori, who felt Dr. Tun should not have privileges at Children's Hospital.

3. All of Affiant's actions were pursuant to the By-Laws of the Children's Hospital. Affiant acted without malice or prejudice towards Dr. Tun, and acted only in the best interests of the safety and

welfare of patients at Children's Hospital.

Further Affiant sayeth naught.

DATED: Honolulu, Hawaii, January 7, 1985.

/S/Walton Shim, M.D.

[Jurat]

Excerpt from Exhibit A to Children's Hospital, et al.'s Motion for Summary Judgment

AUTHORIZATION FOR RELEASE OF INFORMATION

I agree to abide by the Medical Staff By-Laws, Rules and Regulations of Kauikeolani Children's Hospital as now existing or hereafter amended and authorize the Hospital to investigate and review my qualifications for the purpose of appointment to the staff or renewal of privileges.

I further authorize any individual and/or organization to release any information requested by Kauikeolani Children's Hospital, including records and documents, which may bear on my qualifications. In so doing, I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment to the staff or renewal of my staff privileges. Photocopies of this document will be as binding as the original.

/S/Than Tun, M.D.

Signature of Physician

Dated April 5, 1977

Exhibit B to Children's Hospital, et al.'s Motion for Summary Judgment

Kauikeolani Children's Hospital

October 16, 1977

Than Tun, M.D.
1374 Nuuanu Avenue, #200-A
Honolulu, Hawaii 96817

Dear Dr. Tun:

It is a pleasure to advise you that the Board of Trustees, upon recommendation of the Medical Executive Committee, has approved your application for privileges at Children's Hospital.

You have been granted Probationary Privileges in the practice of Anesthesiology, Department of Special Clinics, Active Staff.

Enclosed is a copy of our present Medical Staff By-Laws, Rules and Regulations. Please peruse the By-Laws and, at your earliest convenience, drop by the Administrator's Office to sign our Minute Book signifying your acceptance of these By-Laws. Your attention is particularly directed to Article VI, which deals with determination of qualifications and privileges for both medical and surgical services.

A Probationer may apply for termination of his probationary status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients, private or staff, cared for in the hospital by the applicant during his period of probation, including operating room evaluation of five (5) cases by at least three (3) different observers. If unable to accumulate five (5) cases the probationer may submit two (2) observed and approved cases performed at this hospital during two (2) years of probation while actively practicing in the City and County of Honolulu. These cases should be representatives of the complexity and type of major surgery upon which privileges are desired.

If you have any suggestions or criticisms that you care to make at any time that will further the improvement of services to our hospital, please note your comments in writing and forward them to the Medical Executive Committee.

We welcome you to the Medical Staff at Children's Hospital, and we look forward to your participation as a member of the active staff.

Sincerely,
Paul E. Cook
Administrator

Exhibit C to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpt from Children's Hospital Medical Staff By-Laws

ARTICLE V. PROCEDURES FOR MEDICAL STAFF MEMBERSHIP AND MEMBERSHIP RENEWAL

SECTION 1. APPLICATION FOR MEMBERSHIP

A. Application for membership to the Medical Staff shall be presented in writing on a prescribed form which shall:

1. Indicate the staff category and privileges for which the applicant qualifies.
2. State the qualifications and references of the applicant. Two letters of recommendation must be provided. One letter should be from the Director of Residency where the applicant received his/her residency, and the other should be from the last institution with which affiliated. Documented evidence of specialized training must be provided.
3. Include information as to whether the applicant's membership status and/or clinical privileges have ever been revoked, suspended, reduced or not renewed at any other hospital or institution, and as to whether his membership in local, state or national medical societies, or his license to practice in any jurisdiction has ever been suspended or terminated.
4. Permit the hospital to obtain information from previously-attended hospitals or other institutions regarding his professional performance.
5. Include a statement that the applicant has no physical or mental impairment affecting his professional performance.
6. Include a statement that the applicant has had cardiopulmonary resuscitation certification within the past two years.
7. Include a statement that the applicant has complied with all continuing medical education requirements for current licensing in the State of Hawaii.
8. Signify his agreement to abide by the Bylaws, Rules and Regulations currently in effect (a copy of the Bylaws should accompany the application form).

B. The properly completed application for membership shall be presented to the Chief Executive Officer for transmittal to the Credentials Committee.

C. It shall be the applicant's burden to resolve any reasonable questions which arise because of his application to the satisfaction of

the Credentials Committee.

SECTION 2. PROCEDURE FOR PROCESSING APPLICATION

A. Function of the Chief Executive Officer. Upon receipt of the application, the Chief Executive Officer shall:
   1. Inspect for proper completion.
   2. Notify the applicant promptly:
      a. Of receipt of the application.
      b. If the application is incomplete or faulty and return it for proper completion.
      c. Of meeting dates of the Credentials Committee and Medical Executive Committee, and that final action will be approval by the Board of Trustees.
   3. Refer the application to the Credentials Committee at its next regular meeting.

B. The Credentials Committee shall:
   1. Be responsible for the complete investigation and verification of the character, qualifications and standing of the applicant.
   2. If necessary, refer the application to the appropriate departmental committees for review of special qualifications.
   3. If necessary, request the applicant to present himself for a personal interview.
   4. Within thirty (30) days of receipt of the application, file a written report of its findings and recommendations with the Medical Executive Committee. The recommendations shall be to:
      a. Defer. When this recommendation is made, the committee shall:
         1) Indicate the reasons.
         2) Notify the applicant of the deferred action and the reasons thereof.
         3) Within thirty days following the initial report, file a supplementary report.
      b. Accept. When this recommendation is made, the committee shall also assign privileges as provided in Article VI of these Bylaws.
      c. Reject. When this recommendation is made, the reasons for rejection shall be clearly documented.

C. The Medical Executive Committee shall:
   1. Review the findings and recommendations of the Credentials Committee.

2. Within thirty (30) days of receipt of the report from the Credentials Committee, file a written report of its findings and recommendations with the Board of Trustees.
   a. If the Medical Executive Committee agrees with the recommendations of the Credentials Committee, and
      1) The recommendation is to defer: No further action is to be taken until a follow-up report is received from the Credentials Committee.
      2) The recommendation is to accept: Recommendation may be accepted as submitted or modified. If modified, the reasons for modification shall be clearly documented.
      3) The recommendation is to reject: The documentation must show that this action is unanimous.
   b. If the Medical Executive Committee disagrees with the recommendations of the Credentials Committee, it shall return the report to the Credentials Committee, stating its reasons. The Credentials Committee shall re-evaluate and submit a supplementary report as in Paragraph B above.
3. Inform the applicant via certified mail, return receipt requested, of his rights to a hearing as provided in Article VIII of these Bylaws if the recommendation is adverse with respect to membership or privileges.
   a. If the applicant waives his right to a hearing, this fact shall be noted in the report.
   b. If the applicant requests a hearing, such hearing shall be held as provided in Article VIII, and a full account of the proceedings shall become a part of this report.
   c. No such adverse recommendation need be forwarded to the Board of Trustees until after the practitioner has exercised or has been deemed to have waived his right to a hearing as provided in Article VIII of these Bylaws.
   d. If, after the Medical Executive Committee has considered the report and recommendation of the hearing committee and the hearing record, the Medical Executive Committee's reconsidered recommendation is favorable to the practitioner, it shall be processed in accordance with Subparagraph C-2 of this Section 2. If such recommendation continues to be adverse, the Chief Executive Officer shall promptly notify the practitioner by certified mail, return

receipt requested. The Chief Executive Officer shall also forward such recommendation and documentation to the Board of Trustees, but the Board of Trustees shall not take any action thereon until after the practitioner has waived his right to an appellate review as provided in Article VIII of these Bylaws.

D. The Board of Trustees shall, at its next regular meeting:

1. Review the report and recommendations of the Medical Executive Committee. Its action shall be to either agree or disagree with the recommendations.
   a. If the Board of Trustees agrees with the findings and recommendations, it shall act on the matter.
      1) If the Board ratifies the recommendation to accept the applicant as a member, the Chief Executive Officer shall be authorized to transmit the decision to the applicant. The acceptance shall be on a provisional basis subject to review at the end of twelve (12) months before full membership can be granted. Such notice shall include assigned privileges.
      2) If the Board ratifies the recommendation to reject, the Chief Executive Officer shall be instructed to transmit this decision and inform the applicant of his rights to appellate review as provided in Article VIII by certified mail, return receipt requested.
   b. If the Board of Trustees disagrees with the recommendations, it shall:
      1) Return the report to the Medical Executive Committee, stating its reasons.
      2) Direct additional hearings.
      3) Submit the matter to a Joint Conference Committee.
      4) Render final decision only after 1, 2, or 3 above has been accomplished.
      5) The fact that the adverse decision is held in abeyance shall not be deemed to confer privileges where none existed before.
      6) At its next regular meeting after all of the practitioner's rights under the Article VIII have been exhausted or waived, the Board of Trustees or its duly organized committee shall act in the matter. The Board of Trustees' decision shall be conclusive, except that the

Board of Trustees may defer final determination by referring the matter back for further reconsideration. Any such referral back shall state the reasons therefore, shall set a time-limit within which a subsequent recommendation to the Board of Trustees shall be made, and may include a directive that an additional hearing be conducted to clarify issues which are in doubt. At its next regular meeting after receipt of such subsequent recommendation and new evidence in the matter, if any, the Board of Trustees shall make a decision either to provisionally appoint the practitioner to the staff or to reject him for staff membership. All decisions to appoint shall include a delineation of the clinical privileges which the practitioner may exercise.

7) When the Board of Trustees' decision is final, it shall send notice of such decision through the Chief Executive Officer to the Chief of Staff and to the Chief of Department concerned, and by certified mail, return receipt requested, to the practitioner.

SECTION 3. MEMBERSHIP RENEWAL PROCESS

A. Forty-five (45) days prior to the expiration of his membership, a member shall be notified in the form of a "Renewal Notice."

1. The renewal notice shall include:

a. The category of membership for which he qualifies.

b. A certification statement, to be signed by the member, that:

1) He is free of any physical or mental impairment affecting his professional competence, noting any exceptions.

2) He has complied with all continuing education requirements for current licensing in the State of Hawaii.

c. Request for information regarding additional or specialized training that may affect his privileges.

d. Include information as to whether the applicant's membership status and/or clinical privileges have ever been revoked, suspended, reduced or not renewed at any other hospital or institution, and as to whether his membership in local, state or national medical societies, or his license to practice in any jurisdiction has ever been suspended or terminated.

e. Permit the hospital to obtain information from previously-attended hospitals or other institutions regarding his professional performance.

f. Request for recent or anticipated address/phone changes.

2. The renewal notice must be signed and returned to the Credentials Committee within fifteen (15) days. Failure to respond shall be construed as voluntary termination of medical staff membership.

3. It shall be the applicant's burden to resolve any reasonable questions pertaining to his membership renewal to the satisfaction of the Credentials Committee.

B. The Credentials Committee shall be responsible for the appraisal of all aspects of a member's professional competence including, but not necessarily limited to, a member's technical abilities, adherence to standards of moral and ethical conduct, compliance with the Bylaws, Rules and Regulations, awareness of physical and mental limitations, and willingness to participate in the affairs of the Medical Staff. The Credentials Committee is hereby authorized to:

1. Avail itself of all sources of information regarding a member's professional performance.

2. Develop its own reappraisal criteria subject to approval by the Medical Executive Committee.

C. Any adverse recommendations shall be subject to the provisions of Article VIII.

D. The Credentials Committee shall transmit its recommendations to the Medical Executive Committee and Board of Trustees for final approval.

ARTICLE VI. CLINICAL PRIVILEGES

SECTION 1. CLINICAL PRIVILEGES RESTRICTED

A. Every practitioner practicing at this hospital by virtue of Medical Staff membership or otherwise shall, in connection with such practice, be entitled to exercise only those clinical privileges specifically granted to him by the Board of Trustees, except as provided in Sections 2 and 3 of this Article VI.

B. Every initial application for staff appointment must contain a request for the specific clinical privileges desired by the applicant. The evaluation of such requests shall be based upon the applicant's education, training, experience, demonstrated competence, references and other relevant information, including an

appraisal by the service in which such privileges are sought. The applicant shall have the burden of establishing his qualifications and competency in the clinical privileges he requests.

C. Periodic redetermination of clinical privileges and the increase or curtailment of same shall be based upon the direct observation of care provided, review of the records of patients treated in this or other hospitals, and review of the records of the Medical Staff which document the evaluation of the member's participation in the delivery of medical care.

D. Members of the Active or Courtesy Staff who become inactive while in good standing may later reapply for privileges. An interim letter and other information deemed necessary may suffice, or completion of the application form may be required and shall be determined at the discretion of the Credentials Committee.

E. Privileges granted to dentists shall be based on their training, experience and demonstrated competence and judgment. The scope and extent of surgical procedures that each dentist may perform shall be specifically delineated and granted in the same manner as all other surgical privileges. Surgical procedures performed by a dentist shall be under the overall supervision of the Chief of Surgery. All dental patients shall receive the same basic medical appraisal as patients admitted to other surgical services.

F. Management of Hospitalized Dental Patients. A dentist must be responsible for seeing that his patient is admitted under the medical supervision of a physician with admitting privileges (Active or Courtesy). This physician must be someone other than the anesthesiologist for that case. Preoperative lab requirements and x-ray examinations are necessary when indicated to precede all dental surgery.

G. Anesthesia. An M.D. anesthesiologist must be responsible for the anesthesia of a dental patient.

SECTION 2. TEMPORARY PRIVILEGES

A. Upon receipt of an application for Medical Staff membership from an appropriately licensed practitioner, the Chief Executive Officer may, upon the basis of information then available which may reasonably be relied upon as to the competence and ethical standing of the applicant, and with the concurrence of the service chief concerned and of the Chief of Staff, grant temporary admitting and clinical privileges to the applicant; but in exercising such

privileges, the applicant shall act under the supervision of the Chief of Department to which he is assigned. The Chairman of the Credentials Committee will be notified of such appointment.

B. Temporary clinical privileges may be granted by the Chief Executive Officer for the care of a specific patient to a practitioner who is not an applicant for membership in the same manner and upon the same conditions as set forth in Section 2-A, provided that there shall first be obtained such practitioner's signed acknowledgment that he had received and read copies of these Medical Staff Bylaws, Rules and Regulations adopted pursuant thereto, and that he agrees to be bound by the terms thereof in all matters relating to his temporary clinical treatment of not more than six (6) patients in any one year by any practitioner, beyond which such practitioner shall be required to apply for membership on the Medical Staff before being allowed to attend additional patients.

C. The Chief Executive Officer may permit a physician serving as a locum tenens for a member of the Medical Staff to attend patients without applying for membership on the Medical Staff for a period not to exceed sixty (60) days, providing all of his credentials have first been approved by the Chief of Department concerned and by the Chief of Staff. The Chairman of the Credentials Committee shall be notified of such an appointment.

D. Special requirements of supervision and reporting may be imposed by the Chief of Department concerned on any practitioner granted temporary privileges. Temporary privileges shall be immediately terminated by the Chief Executive Officer upon notice of any failure by the practitioner to comply with such special conditions.

E. The Chief Executive Officer may at any time, upon the recommendation of the Chief of Staff or the Chief of Department concerned terminate a practitioner's temporary privileges effective as of the discharge from the hospital of the practitioner's patient(s) then under his care in the hospital. However, where it is determined that the life or health of such patient(s) would be endangered by continued treatment by the practitioner, the termination may be imposed by any person entitled to impose a summary suspension pursuant to Section 2-A, Article VII of these Bylaws, and the same shall be immediately effective. The appropriate Chief of Department, or the Chief of Staff in his

absence, shall assign a member of the Medical Staff to assume responsibility for the care of such terminated practitioner's patient(s) until they are discharged from the hospital. The wishes of the patient(s) shall be considered where feasible in selection of such substitute practitioner.

SECTION 3. EMERGENCY PRIVILEGES

In the case of emergency, any physician or dentist member of the Medical Staff, to the degree permitted by his license and regardless of service or staff status or lack of it, shall be permitted and assisted to do everything possible to save the life of a patient, using every facility of the hospital necessary, including the calling for any consultation necessary or desirable. When an emergency situation no longer exists, such physician or dentist must request the privileges necessary to continue to treat the patient. In the event such privileges are denied or he does not desire to request privileges, the patient shall be assigned to an appropriate member of the Medical Staff. For the purpose of this section, an "emergency" is defined as a condition in which serious permanent harm would result to a patient or in which the life of a patient is in immediate danger and any delay in administering treatment would add to that danger.

SECTION 4. SURGICAL PRIVILEGES

During the period of probation (Article IV, Section 5), all operative procedures performed by the probationer shall be carried out under the observation of a member of the active surgical staff with full privileges in the specialty involved, or observers on service as provided by the Chief of the Department of Surgery.

A. A probationer may apply for termination of his provisional status by submitting to the Chief of Surgery a complete summary of the hospital records of five (5) patients; private or staff, cared for in the hospital by the applicant during his period of probation, including operating room evaluation of five (5) cases by at least three (3) different observers. If unable to accumulate five (5) cases, the probationer may submit two (2) observed and approved cases performed at this hospital during two (2) years of probation while actively practicing in the City and County of Honolulu. These cases should be representative of the complexity and type of major surgery upon which privileges are desired.

B. The Chief of Surgery and the Surgical Executive Committee shall review the reports and call the candidate for further examination whenever deemed necessary. Upon completion of review of the

records of the candidate, the Chief of Surgery shall make recommendations to the Credentials Committee as follows:

1. The applicant be given unrestricted privileges in surgery, in which case the Chief of Surgery may rescind the necessity for further observation. This is a temporary measure effective until the Board of Trustees acts on the probationer's application for full privileges.
2. The applicant be given restricted privileges in surgery according to a plan established by the Surgical Executive Committee.
3. The provisional period be extended.
4. The provisional period be terminated until the candidate obtains further formal training.

SECTION 5. MEDICAL PRIVILEGES

A. A probationer may apply for termination of his provisional status by submitting to the Chief of Medicine a complete summary of the hospital records of five (5) inpatients, private or staff, cared for in the hospital by the applicant during his period of probation. Summaries may be either written individually by the probationer or be the chart summary dictated by the resident involved in the case.

B. The Chief of Medicine shall review the submitted summaries. Upon completion of review of the summaries, the Chief of Medicine shall make recommendations to the Credentials Committee as follows:

1. The applicant be given privileges commensurate with his abilities.
2. The applicant be given restricted privileges based on his qualifications.
3. The provisional period be extended.
4. The provisional period be terminated until the applicant obtains further formal training.

C. If deemed necessary, the Chief of Medicine may consult with the Chief of Family Practice, Chief of Surgery, Chiefs of the different clinical specialties and the Chairman of the Credentials Committee.

D. If, in the opinion of the Credentials Comittee and approved by the Medical Executive Committee, the applicant is in a non-surgical field where termination of provisional privileges by submission of the complete summaries of the hospital records of five (5)

inpatients personally attended is impractical (such as specialties having extremely rare admissions), the applicant may be considered for full status on the basis of hospital activities which shall include, but not be limited to, attendance at meetings and committee work.

SECTION 6. ALLIED HEALTH PROFESSIONALS

A. DEFINITIONS/QUALIFICATIONS. Allied Health Professionals (AHP's) are individuals who are not employees of the hospital who hold a license, certificate or other legal credentials as required by law and who:

1. Can present documents of acceptable backgrounds of formal education and experience in their particular field.
2. Are qualified to provide a needed service within the hospital.
3. Adhere strictly to the ethics of their respective professions.

B. PROCEDURE FOR SPECIFICATION OF SERVICES. Application for specified services shall be submitted and processed in the same manner as for clinical privileges for physicians and dentists as provided in Article V, and the AHP shall be assigned to the clinical department appropriate to his professional training and shall be subject to all regulatory policies of that department as approved by the Medical Executive Comittee. Privileges are renewable at the same interval as Medical Staff privileges.

C. RESPONSIBILITIES. Each AHP shall:

1. Provide patient care services only in the area of his/her professional competence and only under the supervision or direction of a physician member of the Medical Staff.
2. Participate as appropriate in patient care audit and other quality review, evaluation and monitoring activities required of the staff.
3. Sign an agreement to abide by all policies, rules and regulations of Kauikeolani Children's Hospital.
4. Document, within the medical record, services provided and shall make signed entries containing pertinent, meaningful observations and information to the extent of such services provided.

D. RELATIONSHIP TO SUPERVISING MEMBER OF THE MEDICAL STAFF. The member of the Medical Staff utilizing the services of an AHP shall:

1. Assume responsibility and liability for any actions taken and services performed by the AHP.

2. Document his/her approval of the services provided by countersigning within 24-hours all entries within the medical record signed by the AHP.

E. RELATIONSHIP TO BOARD OF TRUSTEES

1. Approval or disapproval of privileges is at the absolute discretion of the Board of Trustees.
2. The Board of Trustees reserves the right to terminate privileges at any time.

ARTICLE VII. CORRECTIVE ACTION

SECTION 1. PROCEDURE

A. Whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the Medical Staff or to be disruptive to the operations of the hospital, corrective action against such practitioner may be requested by any officer of the Medical Staff, by the Chief of any Department, by the chairman of any standing committee of the Medical Staff, by the Chief Executive Officer or by the Board of Trustees. All requests for corrective action shall be in writing, shall be made to the Medical Executive Committee, and shall be supported by reference to the specific activities or conduct which constitute the grounds for the request.

B. Whenever the corrective action could be a reduction or suspension of clinical privileges, the Medical Executive Committee shall forward such request to the Chief of the Department wherein the practitioner has such privileges. Upon receipt of such request, the Chief of Department shall immediately appoint an Ad Hoc Committee to investigate the matter.

C. Within fifteen (15) days after the department's receipt of the request for corrective action, the Chief of Department shall make a report of its investigation to the Medical Executive Committee. Prior to the making of such report, the practitioner against whom corrective action has been requested shall have an opportunity for an interview with the department Ad Hoc investigating committee. At such interview, he shall be informed of the general nature of the charges against him and shall be invited to discuss, explain or refute them. This interview shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these Bylaws with respect to hearings shall apply thereto. A record of such interview shall be made by the department and included with its report to the Medical Executive Committee.

D. Within fifteen (15) days following the receipt of a request for corrective action, or following receipt of a report from a department following the department's investigation of a request for corrective action involving reduction or suspension of clinical privileges, the Medical Executive Committee shall take action upon the request. If the corrective action could involve a reduction or suspension of clinical privileges, or a suspension or expulsion from the Medical Staff, the affected practitioner shall be permitted to make an appearance before the Medical Executive Committee prior to its taking action on such request. This appearance shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these Bylaws with respect to hearings shall apply thereto. A record of such appearance shall be made by the Medical Executive Committee.

E. The action of the Medical Executive Committee on a request for corrective action may be to reject or modify the request for corrective action, to issue a warning, a letter of admonition or a letter of reprimand, to impose terms of probation or a requirement for consultation, to recommend reduction, suspension or revocation of clinical privileges, to recommend that an already imposed summary suspension of clinical privileges be terminated, modified or sustained, or to recommend that the practitioner's staff membership be suspended or revoked.

F. Any recommendation by the Medical Executive Committee for reduction, suspension or revocation on clinical privileges, or for suspension or expulsion from the Medical Staff, shall entitle the affected practitioner to the procedural rights provided in Article VIII of these Bylaws.

G. The Chief of Staff shall promptly notify the Chief Executive Officer in writing of all requests for corrective action received by the Medical Executive Committee and shall continue to keep the Chief Executive Officer fully informed of all action taken in connection therewith. After the Medical Executive Committee has made its recommendation on the matter, the procedure to be followed shall be as provided in Article V, Section 2, and in Article VIII if applicable, of these Bylaws.

SECTION 2. SUMMARY SUSPENSION

A. Any one of the following—the Chief of Staff, a Chief of Department, the Chief Executive Officer and the Executive Committee of either the Medical Staff or the Board of Trustees—shall each

have the authority, whenever action must be taken immediately in the best interest of patient care in the hospital, to summarily suspend all or any portion of the clinical privileges of a practitioner, and such summary suspension shall become effective immediately upon imposition.

B. A practitioner whose clinical privileges have been summarily suspended shall be entitled to request that the Medical Executive Committee hold a hearing on the matter within such reasonable time period thereafter as a Medical Executive Committee may be convened in accordance with Article VIII of these Bylaws.

C. The Medical Executive Committee may recommend modification, continuance or termination of the terms of the summary suspension. If, as a result of such hearing, the Medical Executive Committee does not recommend immediate termination of the summary suspension, the affected practitioner shall, also in accordance with Article VIII, be entitled to request an appellate review by the Board of Trustees, but the terms of the summary suspension as sustained or as modified by the Medical Executive Committee shall remain in effect pending a final decision thereon by the Board of Trustees.

D. Immediately upon the imposition of a summary suspension, the Chief of Staff or responsible Chief of Department shall have authority to provide for alternative medical coverage for the patients of the suspended practitioner still in the hospital at the time of such suspension. The wishes of the patients shall be considered in the selection of such alternative practitioner.

SECTION 3. AUTOMATIC SUSPENSION

A. A temporary suspension in the form of withdrawal of a practitioner's admitting privileges, effective until medical records are completed, shall be imposed automatically after warning of delinquency for failure to complete medical records pursuant to Rules and Regulations, Admission and Discharge section.

B. Action by the State Board of Medical Examiners revoking or suspending a practitioner's license shall automatically suspend all of his hospital privileges.

C. Failure to complete a History and Physical within 24-hours of admission will result in Automatic Suspension of Admitting Privileges.

D. It shall be the duty of the Chief of Staff to cooperate with the Chief Executive Officer in enforcing all Automatic Suspensions.

E. Automatic Suspension of privileges will be lifted upon correction of the deficiency.

F. For the notification process for suspension, see Rules and Regulations, Admission and Discharge section.

ARTICLE VIII. HEARING AND APPELLATE REVIEW OF PROCEDURE

SECTION 1. RIGHT TO HEARING AND TO APPELLATE REVIEW

A. When any practitioner receives written notice of a recommendation of the Medical Executive Committee that, if ratified by decision of the Board of Trustees, will adversely affect his appointment to or status as a member of the Medical Staff or his exercises of clinical privileges, he shall be entitled to a hearing following adequate notice thereof before an Ad Hoc Committee of the Medical Staff. If the recommendation of the Medical Executive Committee following such hearing is still adverse to the affected practitioner, he shall then be entitled to an appellate review by the Board of Trustees before the Board of Trustees makes a final decision on the matter.

B. When any practitioner receives notice of a decision by the Board of Trustees that will affect his appointment to or status as a member of the Medical Staff or his exercise of clinical privileges, and such decision is not based on a prior adverse recommendation by the Executive Committee of the Medical Staff with respect to which he was entitled to a hearing and appellate review, he shall be entitled to a hearing by a committee appointed by the Board of Trustees, and if such hearing does not result in a favorable recommendation, to an appellate review by the Board of Trustees before the Board of Trustees makes a final decision on the matter.

C. All hearings and appellate reviews shall be in accordance with the procedural safeguards set forth in this Article VIII to assure that the affected practitioner is accorded all rights to which he is entitled.

The Board of Trustees shall:

1. Advise the applicant of his right to a hearing or an appellate review pursuant to Article VIII of the Bylaws;
2. Specify that he shall have fifteen (15) days following the date of receipt of such notice within which to request a hearing or an appellate review.
3. Advise the applicant that failure to request a hearing or an

appellate review within the specified time period shall constitute a waiver of his right to same;

4. Upon receipt of the applicant's request, notify him of the date, time and place for the hearing or appellate review and the grounds upon which the adverse action is based; and
5. Advise him of his right to review the hearing record and report, if any, and to submit a written statement in his behalf as part of the appellate procedure.

SECTION 2. REQUEST FOR HEARING

A. The Chief Executive Officer shall be responsible for giving prompt written notice of an adverse recommendation or decision to any affected practitioner who is entitled to a hearing or to an appellate review, by a certified mail, return receipt requested.

B. The failure of a practitioner to request a hearing to which he is entitled by these Bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such hearing and to any appellate review to which he might otherwise have been entitled on the matter. The failure of a practitioner to request an appellate review to which he is entitled by these Bylaws within the time and in the manner herein provided shall be deemed a waiver of his right to such appellate review on the matter.

C. When the waived hearing or appellate review relates to an adverse recommendation of the Executive Committee on the Medical Staff or of a hearing committee appointed by the Board of Trustees, the same shall thereupon become and remain effective against the practitioner pending the Board of Trustees' decision on the matter. When the waived hearing or appellate review relates to an adverse decision by the Board of Trustees, the same shall thereupon become and remain effective against the practitioner in the same manner as a final decision of the Board of Trustees provided for in Section 7 of this Article VIII. In either of such events, the Chief Executive Officer shall promptly notify the affected practitioner of his status by certified mail, return receipt requested.

SECTION 3. NOTICE OF HEARING

A. Within fifteen (15) days after receipt of a request for hearing from a practitioner entitled to the same, the Executive Committee or the Board of Trustees, whichever is appropriate, shall schedule and arrange for such a hearing and shall, through the Chief Executive Officer, notify the practitioner of the time, place and

date so scheduled, by certified mail, return receipt requested. The hearing date shall be not less than seven (7) days nor more than fifteen (15) days from the date of receipt of the request for hearing; provided, however, that a hearing for a practitioner who is under suspension which is then in effect shall be held as soon as arrangements therefore may reasonably be made, but not later than fifteen (15) days from the date of receipt of such practitioner's request for hearing.

B. The notice of hearing shall state in concise language the acts or omissions with which the practitioner is charged, a list of specific or representative charts being questioned, and/or the other reasons or subject matter that was considered in making the adverse recommendation or decision.

SECTION 4. COMPOSITION OF HEARING COMMITTEE

A. When a hearing relates to an adverse recommendation of the Medical Executive Committee, such hearing shall be conducted by an Ad Hoc hearing committee of not less than 5 members of the Medical Staff appointed by the Chief of Staff in consultation with the Medical Executive Committee and one of the members so appointed shall be designated as Chairman. No staff member who has actively participated in the consideration of the adverse recommendation shall be appointed a member of this hearing committee.

B. When a hearing relates to an adverse decision of the Board of Trustees that is contrary to the recommendation of the Medical Executive Committee, the Board of Trustees shall appoint a hearing committee to conduct such a hearing and shall designate one of the members of this committee as Chairman. At least one representative from the Medical Staff shall be included on this committee when feasible.

SECTION 5. CONDUCT OF HEARING

A. There shall be at least a majority of the members of the hearing committee present when the hearing takes place, and no member may vote by proxy.

B. An accurate record of the hearing must be kept. The mechanism shall be established by the Ad Hoc hearing committee and may be accomplished by use of a court reporter, electronic recording unit, detailed transcription or by the taking of adequate minutes.

C. The personal presence of the practitioner for whom the hearing has been scheduled shall be required. A practitioner who fails

without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner as provided in Section 2 of this Article VIII and to have accepted the adverse recommendation or decision involved, and the same shall thereupon become and remain in effect as provided in said Section 2.

D. Postponement of hearings beyond the time set forth in these Bylaws shall be made only with the approval of the Ad Hoc hearing committee. Granting of such postponements shall only be for good cause shown and in the sole discretion of the hearing committee.

E. The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the Medical Staff in good standing or by a member of his local professional society.

F. Either a hearing officer, if one is appointed, or the Chairman of the hearing committee or his designee shall preside over the hearing to determine the order of procedure during the hearing, to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence, and to maintain decorum.

G. The hearing need not be conducted strictly according to rules of law relating to the examination of witnesses or presentation to evidence. Any relevant matter upon which responsible persons customarily rely in the conduct of serious affairs shall be considered, regardless of the existence of any common law or statutory rule which might make evidence inadmissible over objection in civil or criminal action. The practitioner for whom the hearing is being held shall, prior to or during the hearing, be entitled to submit memoranda concerning any issue of procedure of fact, and such memoranda shall become a part of the hearing record.

H. The Medical Executive Committee, when its action has prompted the hearing, shall appoint one of its members or some other Medical Staff member to represent it at the hearing, to present the facts in support of its adverse recommendation and to examine witnesses. The Board of Trustees, when its action has prompted the hearing, shall appoint one of its members to represent it at the hearing, to present the facts in support of its adverse decision and to examine witnesses. It shall be the obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision, but the affected practitioner shall

thereafter be responsible for supporting his challenge to the adverse recommendation or decision by an appropriate showing that the charges or grounds involved lack any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious.

I. The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness on any matter relevant to the issue of the hearing, to challenge any witness and to rebut any evidence. If the practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination. The hearing committee may order that oral evidence be taken only on oath or affirmation administered by any person entitled to notarize documents in the State of Hawaii where the hearing is held.

J. The hearings provided for in these Bylaws are for the purpose of resolving, on an intra-professional basis, matters bearing on professional competence and conduct. Accordingly, neither the affected practitioner, nor the Medical Executive Committee nor the Board of Trustees, shall be represented at any phase of the hearing procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by counsel. The foregoing shall not be deemed to deprive the practitioner, the Medical Executive Committee or the Board of Trustees of the right to legal counsel in connection with preparation for the hearing or for a possible appeal; and, if a hearing officer is utilized, he may be an attorney at law.

K. The hearing committee may, without special notice, recess the hearing and reconvene the same for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The hearing committee may thereupon, at a time convenient to itself, conduct its deliberations outside the presence of the practitioner for whom the hearing was convened.

L. Within fifteen (15) days after the final adjournment of the hearing, the hearing committee shall make a written report and recommendation and shall forward the same together with the hearing record and all other documentation to the Medical Executive Committee or the Board of Trustees, whichever appointed it. The report may recommend confirmation, modification or rejection

of the original adverse recommendation of the Medical Executive Committee or decision of the Board of Trustees. The Medical Executive Committee or Board of Trustees, whichever initiated the hearing, shall render a decision within fifteen (15) days. The Chief Executive Officer is charged with the responsibility of promptly notifying the affected practitioner of this decision.

SECTION 6. APPEAL TO THE BOARD OF TRUSTEES

A. Within ten (10) days after receipt of a notice by an affected practitioner of an adverse recommendation or decision made or adhered to after a hearing as above provided, he may, by written notice to the Board of Trustees, delivered through the Chief Executive Officer by certified mail, return receipt requested, request an appellate review by the Board of Trustees. Such notice may request that the appellate review be held only on the record on which the adverse recommendation or decision is based, as supported by the practitioner's written statement provided for below or may also request that oral argument be permitted as part of the appellate review.

B. If such appellate review is not requested wthin ten (10) days, the affected practitioner shall be deemed to have waived his right to the same and to have accepted such adverse recommendation or decision, and the same shall become effective immediately as provided in Section 2 of this Article VIII.

C. Within twenty-two (22) days after receipt of such notice of request for appellate review, the Board of Trustees shall schedule a date for such review, including a time and place for oral argument if such has been requested, and shall, through the Chief Executive Officer, by certified mail, return receipt requested, notify the affected practitioner of the same. The date of the appellate review shall not be less than seven (7) days, nor more than twenty-two (22) days from the date of receipt of the notice of request for appellate review, except that when the practitioner requesting the review is under a suspension which is then in effect, such review shall be scheduled as soon as arrangements for it may reasonably be made, but not more than thirty (30) days from the date of receipt of such notice.

D. The appellate review shall be conducted by the Board of Trustees or by a duly appointed appellate review committee of the Board of Trustees of not less than seven (7) members.

E. The affected practitioner shall have access to the report and

record (and transcription, if any) of the Ad Hoc hearing committee and all other material, favorable or unfavorable, that was considered in making the adverse recommendation or decision against him. He shall have 15 days to submit a written statement in his own behalf in which those factual and procedural matters with which he disagrees, and his reasons for such disagreement, shall be specified. This written statement may cover any matters raised at any step in the procedure to which the appeal is related, and legal counsel may assist in its preparation. Such written statement shall be submitted to the Board of Trustees through the Chief Executive Officer, by certified mail, return receipt requested, at least 7 days prior to the scheduled date for the appellate review. A similar statement may be submitted by the Medical Executive Committee or by the chairman of the hearing committee appointed by the Board of Trustees, and if submitted, the Chief Executive Officer shall provide a copy thereof to the practitioner at least 7 days prior to the date of such appellate review by certified mail, return receipt requested.

F. The Board of Trustees or its appointed review committee shall act as an appellate body. It shall review the record created in the proceedings and shall consider the written statements submitted pursuant to subparagraph E of this Section 6 for the purpose of determining whether the adverse recommendation or decision against the affected practitioner was justified and was not arbitrary or capricious. If oral argument is requested as part of the review procedure, the affected practitioner shall be present at such appellate review, shall be permitted to speak against the adverse recommendation or decision, and shall answer questions put to him by any member of the appellate review body. The Medical Executive Committee or the Board of Trustees, whichever is appropriate, shall also be represented by an individual who shall be permitted to speak in favor of the adverse recommendation or decision and who shall answer questions put to him by any member of the appellate review body.

G. New or additional matters not raised during the original hearing or in the hearing committee report, nor otherwise reflected in the record, shall only be introduced at the appellate review under unusual circumstances, and the Board of Trustees or the committee thereof appointed to conduct the appellate review shall, in its sole discretion, determine whether such new matters shall be accepted.

H. If the appellate review is conducted by the Board of Trustees, it may affirm, modify or reverse its prior decision or, in its discretion, refer the matter back to the Medical Executive Committee for further review and recommendation within 30 days. Such referral may include a request that the Medical Executive Committee arrange for a further hearing to resolve specified disputed issues.

I. If the appellate review is conducted by a committee of the Board of Trustees, such committee shall, within ten (10) days after the scheduled or adjourned date of the appellate review, either make a written report recommending that the Board of Trustees affirm, modify or reverse its prior decision, or refer the matter back to the Medical Executive Committee for further review and recommendation. The Medical Executive Committee shall accomplish its review and recommendations within thirty (30) days. Such referrals to the Medical Executive Committee may include a request that it arrange for a further hearing to resolve disputed issues. Within ten (10) days after receipt of such recommendation after referral, the committee of the Board of Trustees shall make its recommendation to the Board of Trustees as above provided.

J. The appellate review shall not be deemed to be concluded until all of the procedural steps provided in this Section 6 have been completed or waived. Where permitted by the Hospital Bylaws, all action required of the Board of Trustees may be taken by a committee of the Board of Trustees duly authorized to act.

SECTION 7. FINAL DECISION BY THE BOARD OF TRUSTEES

A. Within fifteen (15) days after the conclusion of the appellate review, the Board of Trustees shall make its final decision in writing in the matter and shall send notice thereof to the Medical Executive Committee and, through the Chief Executive Officer, to the affected practitioner by certified mail, return receipt requested. If this decision is in accordance with the Medical Executive Committee's last recommendation in the matter, it shall be immediately effective and final, and shall not be subject to further hearing or appellate review. If this decision is contrary to the Medical Executive Committee's last such recommendation, the Board of Trustees shall refer the matter to the Joint Conference Committee for further review and recommendation within thirty (30) days, and shall include in such notice of its decision a statement that a final decision will not be made until after receipt

of the Joint Conference Committee's recommendation. The Board of Trustees shall make its final decision with like effect and notice as first above provided in Section 7.

B. Not withstanding any other provision of these Bylaws, no practitioner shall be entitled as a right to more than one hearing and one appellate review on any matter which shall have been the subject of action by the Medical Executive Committee or by the Board of Trustees or by a duly authorized committee of the Board of Trustees or by both.

Exhibit D to Children's Hospital, et al.'s Motion for Summary Judgment

AUTHORIZATION FOR RELEASE OF INFORMATION

I agree to abide by the Medical Staff Bylaws, Rules and Regulations of Kauikeolani Children's Hospital as now existing and authorize the Hospital to investigate and review my qualifications for the purpose of appointment to the staff or renewal of privileges.

I further authorize any individual and/or organization to release any information requested by Kauikeolani Children's Hospital, including records and documents, which may bear on my qualifications. In so doing, I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment to the staff or renewal of my staff privileges. Photocopies of this document will be as binding as the original.

/S/Than Tun M.D.

Date: June 15, 1982

Exhibit E to Children's Hospital, et al.'s Motion for Summary Judgment

KAPIOLANI-CHILDREN'S MEDICAL CENTER

MESSAGE

TO Than Tun, M.D.

DATE June 23, 1982

TEMPORARY PRIVILEGES IN ANESTHESIOLOGY

As per the attached memo, Temporary Privileges have been approved effective immediately through approximately early September.

Newborn anesthesia and cardiovascular anesthesia privileges are not approved at this time, pending receipt of documentation of training/experience in those areas.

Attached are Anesthesia Guidelines plus Surgical Observer information sheets. Also, a Pharmacy signature card, which you should complete and return as soon as possible.

Michiko Chinen, KCH Medical Staff Office

REPLY

DATE June 28, 1982

Dear Michiko Attached is a signed pharmacy signature card and thanks for your communication so quickly.

Please convey my thanks to Dr. Hattori, Dr. Chung, Dr. Mitsunaga, Dr. Shim and Mr. Cook.

Sincerely,

/S/ Than Tun, M.D.

Exhibit F to Children's Hospital, et al.'s Motion for Summary Judgment

KAUIKEOLANI CHILDREN'S HOSPITAL

Kapiolani/Children's Medical Center

MEMORANDUM

TO:	Admissions	Emergency Room
	Medical Records	Nursing (5)
	Pediatric Operative Services	Dr. Sherrel Hammar, Chief of Pediatrics
	Pharmacy	Chief Pediatric Resident
	KCH Medical Staff Office	Utilization Review Coordinator
	KH Medical Staff Office	Word Processing Center
	Administration	Credentials Committee
	Lab/Pathology	Radiology

FROM: Children's Medical Staff Office (x632)

DATE: June 16, 1982

SUBJECT: *TEMPORARY PRIVILEGES—Children's*

We, the undersigned, have examined this application for Temporary Privileges and find all in order.

/S/ Mitsuo Hattori Date 6-16-82

/S/ Stanley Chung Date 6-18-82

Chief of Service

/S/ W. Shim Date 6/23/82

Chief of Staff

/S/ Paul E. Cook Date 6/23/82

President

Temporary Privileges in ANESTHESIOLOGY, Special Clinical Services, are being extended to the following physician effective immediately and through September, 1982, when Board approval of Provisional Privileges can be expected—NOT INCLUDING NEWBORN ANESTHESIA OR CARDIOVASCULAR ANESTHESIA:

THAN TUN, M.D., Anethesiologist, with observation
600 Kapiolani Boulevard, Suite 203
Honolulu, Hawaii 96813
Phone 521-7427

Exhibit G to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts from the SURGICAL EXECUTIVE COMMITTEE meeting, July 2, 1982

REACTIVATION OF PROVISIONAL PRIVILEGES: THAN TUN, M.D., Anesthesiologist.

Temporary Privileges for Dr. Tun were recently approved by Drs. Hattori, Chung and Shim; however, approval of Dr. Tun's request for newborn and cardiovascular anesthesia privileges was denied, pending submission of documentation of training/experience in those areas. Dr. Hattori reviewed Dr. Tun's previous credential file in which his residency chief had not recommended privileges in newborn or cardiovascular anesthesia. Members were informed that Dr. Tun was previously observed for three non-newborn anesthesia cases at Children's in 1977.

*ACTION: MEMBERS AGREED TO RECOMMEND PROVISIONAL PRIVILEGES FOR DR. TUN BUT NOT INCLUDING NEWBORN AND CARDIOVASCULAR ANESTHESIA, as discussed above. Members further agreed that Dr. Tun submit only two more observed anesthesia cases (for a total of five), with newborn and cardiovascular anesthesia privileges to be considered later.

Exhibit H to Children's Hospital, et al.'s Motion for Summary Judgment

CASES PERFORMED HERE SINCE GRANTING OF TEMPORARY PRIVILEGES ON JUNE 23, 1982

1. *7/3/82, observed by Dr. Mitsuo Hattori.*
   Age = approx. 7½ years.
   Difficult to judge perfomance from a very short procedure like this.
2. *7/3/82, observed by Dr. Efren Baria.*
   Age = approx. 18 years.
   Induction and maintenance good, no anesthetic complications.
3. *7/7/82, observed by Dr. Mitsuo Hattori.*
   Age = 4½ years.
   Operation = meatotomy. Patient has several episodes of croup and upper airway obstruction. Anesthetic Technique: Mask induction, maintenance. Had mild laryngospasm, bradycardia. None of medications were prepared. Atropine was attempted to be given per right jugular without success. Finally given by observer per hand vein.
   Operating Room Deportment: Sleepy.
   Remarks: Poor preparation. No muscle relaxants or atropine were prepared in syringes.
4. *7/7/82, observed by Dr. Mitsuo Hattori.*
   Age = 6¾ years.
   Preop Dx = umbilical hernia. Surgery cancelled because of cardiac arrest.
   Anesthetic Used: N20-halothane. S.C.C.
   General anesthesia needed.
   Anesthetic Technique: Induction under mask with high concentration of Halothane with N20, laryngospasm, bradycardia and PVC's (PVC's warned by observer). IV started by CRNA. Initial intubation failed (esophageal intubation). S.C. was given without Atropine—further bradycardia. Intubation with some delay. Patient cyanotic, then ventricular fibrillation. Observer initiated CPR immediately (Dr. Tun was not quite aware of the situation). NaHC03 given. Defibrillation accomplished by observer. Pupils were dilated after successful defibrillation; reacted to light sluggishly. ABG drawn by observer (WNL by then). No medications were drawn in

syringes. I don't think that he should be doing any pediatric cases in this hospital unless he seeks further training elsewhere.

Exhibit I to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

July 9, 1982
Than Tun, M.D.
600 Kapiolani Blvd., #203
Honolulu, Hawaii 96813
Dear Dr. Tun:

Upon the recommendation of the Chief of Surgery of Kauikeolani Children's Hospital, your Temporary Privileges in Anesthesiology have been terminated, effective immediately. This action has been taken in the best interest of patient care in view of two unacceptable anesthetic cases performed at Children's Hospital.

Under Article VII, Section 2, you are entitled to request that the Medical Executive Committee hold a hearing on this matter. You have thirty days following the date of receipt of this notice to submit a written request for a hearing. Failure to request a hearing within the specified time period shall constitute a waiver of your right to same.

During the period of your summary suspension, you are not permitted to schedule or administer anesthesia to pediatric patients at Children's Hospital. Should you have any questions in this regard, please feel free to call me at your convenience.

Sincerely,
Paul E. Cook
Executive Vice-President
for Richard Davi, President

cc: Walton K.T. Shim, M.D.
Chief of Staff, KCH
Stanley M.K. Chung, M.D.
Chief of Surgery, KCH

Exhibit J to Children's Hosital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
July 9, 1982
Mr. Richard Davi, President
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, HI 96826
Dear Mr. Davi:

Dr. Than Tun has been on provisional status since June 23, 1982 with Temporary Privileges in the Division of Anesthesia—with observation and not including newborn or pediatric cardiovascular anesthesia.

Two observed anesthetic procedures by Dr. Tun were performed in the KCH Operating Rooms on July 7, 1982. The first involved poor preparation of necessary medications prior to administration of anesthesia and Dr. Tuns's unawareness of the patient's problem with upper airway. For the second case, regardless of prior warning by the observer, Dr. Tun began anesthetic induction without properly-prepared necessary medications, was unable to provide adequate ventilation and endotracheal intubation, and without even having started intravenous fluids. IV was started by the CRNA upon the strong recommendations of the observer. By then the patient started to show cardiac arrthymias. Again, Dr. Tun was not quite aware of this serious situation. Finally, the patient was intubated. However, the patient was having ventricular fibrillation. Under the circumstances, the dying patient in hand, the observer took over cardiopulmonary resuscitation and defibrillation. The observer ordered that surgery be cancelled, and the patient was transferred to the Pediatric Intensive Care Unit.

Accordingly, I would recommend that his Temporary Privileges be terminated at this time and no further privileges granted at this hospital.

Sincerely,
Stanley M.K. Chung, M.D.
Chief of Surgery
cc: Mitsuo Hattori, M.D., Chief of Anesthesia
Walton K.T. Shim, M.D., Chief of Staff

Exhibit K to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts form the CREDENTIALS COMMITTEE meeting minutes of July 13, 1982

APPLICATION FOR PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY: THAN TUN, M.D.

As mentioned earlier, Temporary Privileges for Dr. Tun were terminated last week. A copy of the Chief of Surgery's request to the Chief Executive Officer that Dr. Tun's Temporary Privileges be terminated was available for review; that letter also requested that no further privileges be granted Dr. Tun at this hospital. It was pointed out that this special action took place subsequent to the SEC's recommendation that Dr. Tun be granted Provisional Privileges.

*ACTION: MEMBERS AGREED TO REVERSE THE SURGICAL EXECUTIVE COMMITTEE'S RECOMMENDATION TO APPROVE PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY FOR DR. TUN; NO PRIVILEGES ARE RECOMMENDED FOR DR. TUN.

Exhibit L to Children's Hospital, et al.'s Motion for Summary Judgment

Excerpts from the CHILDREN'S MEDICAL EXECUTIVE COMMITTEE meeting minutes of July 27, 1982

d. SURGICAL EXECUTIVE COMMITTEE, *7/2/82*. Dr. Chung provided members with background information related to termination of Dr. Than Tun's temporary privileges in anesthesiology earlier this month and Credentials Committee's recommendations against granting him any privileges at Children's Hospital. The Credentials Committee had reversed the SEC's prior approval of provisional privileges for Dr. Tun. Dr. Chung also presented Anesthesia Guidelines for MEC approval.

ACTION: MEC MEMBERS AGREED TO REJECT DR. TUN'S APPLICATION FOR PROVISIONAL PRIVILEGES IN ANESTHESIOLOGY. The Board members will be informed of this adverse recommendation, and Dr. Tun will be notified of his right to a hearing before a medical staff committee.

Exhibit M to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

July 28, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

The Medical Executive Committee of Kauikeolani Children's Hospital, upon recommendations of the Credentials Committee, will be recommending to the Board of Trustees that your application for medical staff membership and clinical privileges at Children's Hospital be rejected.

In accordance with Article V, Section 2, and Article VIII of the Medical Staff Bylaws, you are entitled to request a hearing to discuss this matter before an Ad Hoc committee of the Medical Staff. You shall have fifteen (15) days following the date of receipt of this notice to submit a written request for such a hearing. Failure to request a hearing within this specified time period shall constitute a waiver of your right to same.

Sincerely,
Paul E. Cook, Executive Vice-President
for Richard Davi, President

Exhibit N to Children's Hospital, et al.'s Motion for Summary Judgment

Date August 13, 1982

Stanley M.K. Chung, M.D.
Chief of Surgery,
Kapiolani/Children's Medical Center.
(Childrens Hospital)
1319 Punahou St., Honolulu, Hawaii, 96826.

Re: Application of Temporary Privileges in Children's Hospital.

Dear Dr. Chung,

Thank you for your letter dated July 28, 82. Much as I like to have privileges in your hospital, (Childrens,) however I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your facilities, at this point of time.

Sincerely,
/S/ Than Tun, M.D.
One Kapiolani Building,
600 Kapiolani Blvd, Suite 203
Honolulu, Hawaii, 96813

Exhibit O to Children's Hospital, et al.'s Motion for Summary Judgement

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
September 30, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

The Board of Trustees of Kauikeolani Children's Hospital, upon recommendations of the Medical Executive Committee, rejected your application for medical staff membership and clinical privileges and Children's Hospital. This action was taken following receipt of your letter of August 13th to Dr. Stanley Chung, Chief of Surgery, in which you waived your right to a hearing following notification of the Medical Executive Committee's recommendations in July.

Regretfully,
Richard Davi
President

Exhibit P to Children's Hospital, et al.'s Motion for Summary Judgement

October 14, 1982.

Mr. Richard Davi
President & Chief Executive Officer
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, Hawaii 96826
Dear Mr. Davi:

I am writing on behalf of Dr. Than Tun and this is to acknowledge receipt of your letter to him dated September 30th 1982. Dr. Tun is my client and he has requested me to answer your letter. First of all, we would like to refer you to Dr. Tun's letter dated August 13, 1982, saying that he didn't find it necessary to avail himself of your facilities at the time of the letter. This means that he was in effect, not pursuing his application for anesthesia privileges in your hospital. He was not pursuing his application, therefore, he was not availing of any right of hearing whatsoever. We would like to make it clear that contrary to your interpretation of Dr. Tun's letter of August 13, 1982, he never waived any right to any hearing. It would seem that your Chief of Surgery, Dr. Stanley Chung has misjudged the professional competence of my client. Whether this was merely based on insufficient or inaccurate facts or whether it was based on pure prejudice, I have advised my client not to dispute anything simply because the chief of surgery and for that matter, any executive committee, is not the proper forum to pass upon the professional competence of Dr. Than Tun. Suffice it to say that we don't agree to the myopic observations of Dr. Stanley Chung, we would not insult ourselves by going down into a petty discussion with him of a totally unnecessary exercise of medical rhetoric. Surprisingly, there were no concrete incidence of complaints from the patient that Dr. Tun was involved with and yet Dr. Chung seem to have raised so much fuss over the whole situation. For the record, we view this as totally unscrupulous and it raises the ethical question of whether Dr. Chung had every right to engaged in any type of judgement on my client. What we know is that there was no concrete case of malpractice or any type of allegation of recklessness against Dr. Than Tun.

Suffice it to say, at this point, nay without much argument, that your decision is purely an administrative matter and we neither subscribe, but certainly disagree the basis upon which such recommendations have been reached.

Again, we would want to reiterate our stand that there was no waiver of a right to a hearing and that we have not pursued our application with your hospital and therefore, my client has never been rejected by your executive committee.

Should you have any question on the foregoing, please do not hesitate to give me a call.

Very truly yours,

GUILLERMO M. CANLAS

cc: Dr. Than Tun

Exhibit Q to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL

Certified Mail

Return Receipt Requested

December 20, 1982
Than Tun, M.D.
600 Kapiolani Boulevard, #203
Honolulu, HI 96813
Dear Dr. Tun:

In accordance with the Medical Staff Bylaws, Article V, Section 2, D-1, b-2, you are entitled to an appellate review by the Board of Trustees in view of its action taken on your application for medical staff membership and privileges in September, 1982. Although it could be implied from your letter of August 13, 1982 that you do not wish an appellate review, you are hereby notified that, if you do so wish, the prior decision of the Board will be withdrawn to permit appellate review and a new decision by the Board.

You shall have fifteen (15) days following receipt of this notice to submit a written request for such an appellate review. Failure to request a review within this specified time period shall constitute a waiver of your right to same.

Sincerely,
Richard Davi
President

Exhibit R to Children's Hospital, et al.'s Motion for Summary Judgment

January 3, 1982

Mr. Richard Davi
President & Chief Exec. Officer
Kapiolani/Children's Medical Center
1319 Punahou Street
Honolulu, Hawaii 96826

Re: *Dr. Than Tun*

Dear Mr. Davi:.

This is to acknowledge receipt of your letter dated December 20, 1982 addressed to Dr. Tun. I am acknowledging said letter on his behalf. We have thought that you understand that Dr. Tun has requested me to represent him in the matter of his application of privileges at your hospital and that we have expressed such representation in my letter of October 14, 1982. I refer you further to the letter of you counsel, Mr. William Goebert, Jr., Esq. A copy of his letter is enclosed for your reference. Please note that Mr. Goebert wrote that "the hospital or myself will be communicating with you within the next three weeks:, the work "you," meaning to Dr. Tun's counsel and not to Dr. Tun himself. I must insist that you follow certain rules of consistency.

Also, since Dr. Tun is represented by counsel, any direct communication to him by the opposite party's counsel or his extension can be properly done so only upon my permission. Next time you communicate directly to my client, we shall view it as a breach of professional responsibility and a sign of bad faith. I am writing this letter directly to you (copy furnished Mr. Goebert) only because your counsel has expressed tacitly that I may do so. If it is otherwise, please let me know. The hospital may continue communicating with me at your option.

Regarding your offer that Dr. Than Tun be given fifteen days from receipt of your letter to submit a written request for an appellate review, Dr. Tun would like to have some time to study it, your proposal coinciding with the holidays. We suggest that we be given up to next week, until January 14, to respond to your letter without counting the fifteen day period except from that date.

If you or your counsel have any question in the meantime, please do not hesitate to communicate with me.

Very truly yours,
GUILLERMO M. CANLAS

cc: Dr. Than Tun
Mr. H. William Goebert, Jr.

Exhibit S to Children's Hospital, et al.'s Motion for Summary Judgment

Kapiolani/Children's Medical Center
KAUIKEOLANI CHILDREN'S HOSPITAL
March 10, 1983

Certified Mail

Return Receipt Requested

Than Tun, M.D.
94-166 Kiaha Loop
Mililani, Hawaii 96789
Dear Dr. Tun:

The Board of Trustees of Kauikeolani Children's Hospital has upheld the Medical Executive Committee's prior recommendations concerning your application for medical staff membership and privileges. This action was taken following non-receipt of a written request from you for an appellate review by the Board of Trustees following our notification to you in December, 1982. Accordingly, you are deemed to have waived your right to such appellate review and to have accepted rejection of your application for medical staff membership and privileges in Anesthesiology at Kauikeolani Children's Hospital.

As provided in the Medical Staff Bylaws, Article VIII, Section 7, B, you are entitled to no further hearings or appellate review on this matter.

Sincerely,
Richard Davi President

APPENDIX H

Silver v. Castle Memorial Hospital,
53 Haw. 475, 497 P.2d 564 (1972),
cert. denied, 409 U.S. 1048 (1972),
reh. denied, 409 U.S. 1131 (1973)

SUPREME COURT OF HAWAII

Syllabus

MAURICE L. SILVER, M.D., Plaintiff-Appellant, *v.* CASTLE MEMORIAL HOSPITAL, a Hawaii non-profit corporation, et al., Defendants-Appellees

No. 4998

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE TOM OKINO, JUDGE

May 24, 1972

RICHARDSON, C.J., ABE, LEVINSON AND KOBAYASHI, JJ., AND CIRCUIT JUDGE VITOUSEK IN PLACE OF MARUMOTO, J., DISQUALIFIED

OPINION OF THE COURT BY KOBAYASHI, J.

Appellant, Dr. Silver, a neurosurgeon, appeals from the judgment of the trial court granting directed verdicts in favor of appellees. The trial court found in favor of appellees, defendants below, on all counts alleged by appellant, including a conspiracy in violation of antitrust laws of the State of Hawaii, a common law conspiracy to monopolize and restrain competition, defamation by certain individual appellees, and an injunction against appellee, Castle Memorial Hospital,

compelling them to permit appellant to use their facilities.

For an adequate disposition of this case the facts need be simply stated.

Appellant first applied for staff privileges at appellee hospital in 1963. After having been given a hearing, appellant's application was denied. In 1965 appellant reapplied for privileges and in 1966 the appellee's hospital board of trustees granted appellant temporary surgery privileges for one year under observation by other doctors. At the close of the probationary period an investigation was conducted into the performance of appellant. The hospital board, acting with recommendation of the committee that had conducted the investigation, decided not to renew appellant's staff privileges. Appellant was granted a hearing and at that time, for the first time, was confronted with the allegations against him and given an opportunity to make an explanation. The earlier decision to deny privileges was upheld.

We find appellant's allegations of conspiracy, defamation, and antitrust violations to be without merit and as to those issues the judgment of the trial court is affirmed. Appellant is not left, however, without a viable claim against appellee Castle Memorial Hospital. This case presents the issue of whether the administrative decision of a private hospital in refusing to grant licensed doctors staff privileges is subject to judicial review.[1] This question has been decided in other jurisdictions on the basis of two distinctly divergent views.

JUDICIAL REVIEW OF PRIVATE HOSPITAL

The majority of jurisdictions have held that a private hospital, as opposed to a public hospital, has the absolute

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[1]The immediate issue has been the subject of much recent law review commentary. *E.g.*, Herring, *Hospital Privileges*, 14 CLEV.-MAR. L. REV. 472 (1965); Southwick, *Hospital Medical Staff Privileges*, 18 DE PAUL L. REV. 655 (1969); Note, *Denial of Hospital Staff Privileges: Hearing and Judicial Review*, 56 IOWA L. REV. 1351 (1971); Note, *Expulsion and Exclusion from Hospital Practice and Organized Medical Societies*, 15 RUTG. L. REV. 327 (1961); Note, *Hospital Staff Privileges: The Need for Legislation*, 17 STAN. L. REV. 900 (1965); Note, *The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy*, 1966 WASH. U.L.Q. 485.

right to exclude any physician from practicing therein. Such a decision of a private hospital board has been held not subject to judicial review,[2] unless the hospital has failed to conform to its own procedural requirements as set forth in its constitution, by-laws, or rules and regulations. The rationale of the majority position has been aptly set forth in *Shulman v. Washington Hospital Center*, 222 F. Supp. 59, 64 (D.D.C. 1963).

> There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily

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[2]Moore v. Andalusia Hosp., Inc., 284 Ala. 259, 224 So.2d 617 (1969); Edson v. Griffin Hosp., 21 Conn. Supp. 55, 144 A.2d 341 (1958); West Coast Hosp. Ass'n v. Hoare, 64 So.2d 293 (Fla. 1953); Mauer v. Highland Park Hosp. Foundation, 90 Ill. App. 2d 409, 232 N.E.2d 776 (1967); Natale v. Sisters of Mercy of Council Bluffs, 243 Iowa 582, 52 N.W.2d 701 (1952); Hughes v. Good Samaritan Hosp., 289 Ky. 123, 158 S.W.2d 159 (1942); Clark v. Physicians and Surgeons Hosp., Inc., 121 So.2d 752 (La. Ct. App. 1960); Glass v. Doctors Hosp., Inc., 213 Md. 44, 131 A.2d 254 (1957); Akopiantz v. Board of County Comm'rs, 65 N.M. 125, 333 P.2d 611 (1958); Leider v. Beth Israel Hosp. Ass'n, 11 N.Y.2d 205, 227 N.Y.S.2d 900, 182 N.E.2d 393 (1962); Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A.2d 456 (1959); Hagan v. Osteopathic Gen. Hosp. of Rhode Island, 102 R.I. 717, 232 A.2d 596 (1967); Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S.E.2d 533 (1962); Group Health Cooperative v. King County Medical Soc'y, 39 Wash.2d 586, 237 P.2d 737 (1951); State ex rel. Sams v. Ohio Valley General Hosp. Ass'n, 149 W.Va. 229, 140 S.E.2d 457 (1965); Johnson v. City of Ripon, 259 Wis. 84, 47 N.W.2d 328 (1951).

hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.

The private status of a private hospital has been held to constitute sufficient justification for the existence of an absolute exclusionary right. *Edson v. Griffin Hospital*, 21 Conn. Supp. 55, 144 A.2d 341 (1958). It is reasoned that even though a doctor may have exemplary qualifications, he has no vested right to practice in a private hospital but merely a privilege which may be granted or denied at the election of the private corporation in exercising its fundamental right to manage its own internal affairs.[3]

We agree that the board of directors of a private hospital should have broad discretionary power in determining which doctors will be given staff privileges and on what basis. There are many justifications for such power aside from the general malpractice considerations. Apparently the state licensing procedure does not distinguish between general practitioners and specialists such as neurosurgeons. Nor does the state licensing system provide for adequate periodic review of a doctor's skill and performance, both of which are of primary importance to the beneficiaries of the services of the hospital

[3]Such a view may not today provide for an automatic nonreviewable exclusionary right, however. In cases involving discriminatory exclusionary practices, federal courts have ruled that when a private hospital has sufficient governmental involvement to constitute state action the federal constitutional standards of due process and equal protection are subject to violation. *E.g.*, Eaton v. Grubbs, 329 F.2d 710, 714-15 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 967 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Citta v. Delaware Valley Hosp., 313 F. Supp. 301, 307 (E.D. Pa. 1970).

and doctors involved, the patients themselves. When considering the interest of the patient, it is not enough that his doctor possess the necessary skills of his profession. The absence of a compatible team working together could impair the doctor's performance and consequently undermine the effectiveness of the treatment given the patient.[4] All of the above criteria are and should be weighed by the board in granting staff privileges. This staff privileges determination is, as a system, the general method utilized by hospitals throughout the country for screening and reviewing applicants in terms of qualifications, current skills, performance, personality and character.

We cannot agree, however, that the discretionary power of a hospital is absolute or that a decision of a private hospital board in refusing to grant a licensed doctor staff privileges is not subject to judicial review. The better rule[5] provides that such review be available as to whether the doctor excluded was afforded procedural due process, and as to whether an abuse of discretion by the hospital board occurred, resulting in an arbitrary, capricious or unreason-

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[4]It has been pointed out that "considerations of team spirit and cooperativeness can be as important as technical skill in recommendations for staff appointments; or, put another way, professional competence in hospital practice should, according to modern hospital theory, include qualities needed for cooperative staff work." Note, *Hospital Staff Privileges: The Need for Legislation*, 17 STAN. L. REV. 900, 905 (1965). The requirement that a doctor have a cooperative personality does not mean, however, that exclusion by a hospital board will be upheld for other than meritorious reasons. In this respect it has been held that "[a] denial of a physician's application upon the basis that his appointment will cause disharmony among the medical staff must be clearly and persuasively supported by the record. The record should also clearly and persuasively indicate that such prospective disharmony probably will have an adverse effect on patient care and not merely annoy or displease certain physicians and administrators." Sussman v. Overlook Hosp. Ass'n, 92 N.J. Super. 163, 182, 222 A.2d 530, 540 (1966).

[5]At present California, New Hampshire, New Jersey, Ohio and Vermont have held that the admissions decisions of private hospitals are subject to judicial review. Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal.2d 806, 810, 376 P.2d 568, 570, 26 Cal. Rptr. 640, 642 (1962); Bricker v. Sceva Speare Memorial Hosp., 281 A.2d 589, 592-93 (N.H. 1971); Greisman v. Newcomb Hosp., 40 N.J. 389, 402-03, 192 A.2d 817, 824-25 (1963); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio App. 2d 246, 251, 250 N.E.2d 892, 896 (1969); Woodard v. Porter Hosp., Inc., 125 Vt. 419, 423, 217 A.2d 37, 40 (1966).

able exclusion. As to what constitutes such an abuse it has been held that "the managing authorities of a private hospital are vested with broad discretionary powers in the selection of its medical and surgical staffs. If the exclusion of a person from its medical or surgical staff is based on the sound and reasonable exercise of discretionary judgment, courts will not intervene, but if the exclusion stems from unreasonable, arbitrary, capricious or discriminatory considerations, equitable relief is available". *Davidson v. Youngstown Hospital Association*, 19 Ohio App.2d. 246, 251, 250 N.E.2d 892, 896 (1969).

The basis for this departure from the traditional rule was first voiced in *Greisman v. Newcomb Hospital*, 40 N.J. 389, 402-04, 192 A.2d 817, 824-25 (1963).

> [W]hile the managing officials [of a private hospital] may have discretionary powers in the selection of the medical staff, those powers are deeply imbedded in public aspects, and are rightly viewed, for policy reasons . . . as fiduciary powers to be exercised reasonably and for the public good.
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> . . . .
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> Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff member-

ship, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good.

PUBLIC VERSUS PRIVATE HOSPITAL

At this point it is appropriate that we note the distinction that has been drawn in characterizing a hospital as a public or private institution. It has been recognized that the generally accepted view is that "a public hospital is an instrumentality of the state, founded and owned in the public interest, supported by public funds, and governed by those deriving their authority from the state. A private hospital is founded and maintained by private persons or a corporation, a state or municipality having no voice in the management or control of its property or the formation of rules for its government." *Woodard v. Porter Hospital, Inc.*, 125 Vt. 419, 422, 217 A.2d 37, 39 (1966). The principal distinguishing feature of a hospital that is characterized as being private is that it as an entity has the power to manage its own affairs and is not subject to the direct control of a governmental agency. *See Shulman v. Washington Hospital Center*, 222 F. Supp. 59, 61-62 (D.D.C. 1963); *Edson v. Griffin Hospital*, 21 Conn. Supp. 55, 144 A.2d 341, 344 (1958). Such a private identity is usually evidenced by the fact that under the hospital's charter or corporate powers granted, it has the right to elect its own board of officers and directors. It is this board in whom is placed, either expressly or impliedly, the discretionary power of granting staff privileges.

It is evident that recently some courts have recognized another hospital classification falling between that of public and private. Such a status can be termed "quasi public" as distinguished from a hospital that is truly private. *E.g.*, *Sussman v. Overlook Hospital Association*, 92 N.J. Super. 163, 168, 222 A.2d 530, 533 (1966), *aff'd*, 95 N.J. Super. 418, 231 A.2d 389 (1967). The "quasi public" status is achieved if what would otherwise be a truly private hospital was constructed with public funds,[6] is presently receiving

[6]Grants by the federal government are made to public and private hospitals

public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public.[7] It is not surprising that courts would be more readily willing to grant judicial review of a private hospital's administrative decision if it could be shown that the hospital in question was not a truly private institution. However, if the proposition that any hospital occupies a fiduciary trust relationship between itself, its staff and the public it seeks to serve is accepted, then the rationale for any distinction between public, "quasi public" and truly private breaks down and becomes meaningless, especially if the hospital's patients are considered to be of primary concern.

In holding that the actions of appellee hospital in this case are subject to judicial review we do not mean to characterize appellee as anything other than a private hospital. In relation to this point we are in concurrence with the reasoning that "a private nonprofit hospital, which receives part of its funds from public sources and through public solicitations, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it functioned, is a 'private hospital' in the sense that it is nongovernmental, but that it is in no position to claim immunity from public supervision and control because of its private nature. The power of the staff of such a hospital to pass on staff membership applications is a fiduciary power which must be exercised reasonably

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for construction costs pursuant to the Hill-Burton Act, 42 U.S.C. § 291 (1965). Castle Memorial Hosp., appellee in this case, was the recipient of $533,225 of such federal funds, in addition to state funds.

[7]Some courts that have not in the past recognized the existence of these criteria as affecting the issue of judicial review are not doing so. In Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (D.D.C. 1963), quoted earlier in this opinion for the rationale of the majority position, the court stated, in holding that the staff membership decisions of a private hospital are not subject to judicial review, that "the circumstance that [the hospital] was constructed with the aid of Government funds, as is the case in this instance, does not detract from its status as a private hospital." *Id.* at 61. Subsequently Shulman, on the basis of recent developing law in this area, sued the hospital again. Although the court in Shulman v. Washington Hosp. Center, 319 F. Supp. 252, 254-55 (D.D.C. 1970), held that the prior decision was *res judicata* as to Shulman's due process claim, it did recognize the significance of governmental involvement.

and for the public good." *Davidson v. Youngstown Hospital Association*, 19 Ohio App. 2d 246, 250, 250 N.E.2d 892, 895 (1969).

In the case before us we need not reach the issue of whether the decision of the board of a truly private hospital not to grant staff privileges is subject to judicial review. As indicated previously, appellee hospital was the recipient of state and federal funding during its construction. Our opinion today, therefore, is limited to those situations where the hospitals involved have had more than nominal governmental involvement in the form of funding. We leave the issue as to what other forms of governmental-public involvement are sufficient to constitute a basis for judicial review and the issue as to whether a truly completely private hospital is subject to such review to future cases wherein those questions are more adequately briefed by the litigants involved.

PROCEDURAL DUE PROCESS—
REQUIREMENT OF A HEARING

Compliance with the principle that a doctor applying for

[T]he Washington Hospital Center is a "private" as distinct from a "public" institution, for the purposes of determining what sort of judicial review is applicable to its actions in managing its staff. *It is clear that this hospital does not have the close governmental ties, either financial or managerial, which would justify its being classified as public.* All of the cases cited by plaintiff to support its argument that defendants should be subject to constitutional standards of due process which require notice, hearing, stated reasons for dismissal, and the right of confrontation, involve hospitals which received substantial government aid for operation or construction, see Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D.Pa. 1970), and/or which were the only hospitals in the area, and thus acquired a quasi-public character, see Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968); Burkhart v. Community Medical Center, 432 S.W.2d 433 (Ky.Ct.App. 1968); Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968). The Court holds that defendant Washington Hospital Center, as a private institution, has the right to remove members of its staff, free from judicial review, so long as its own regulations are followed as was done in this case. (Emphasis added.)

Apparently if the Shulman court had found sufficiently close governmental ties, and the *res judicata* issue had not been controlling, it would have classified the hospital as public and granted judicial review.

staff privileges at a private hospital, as well as at a public hospital, be afforded procedural due process requires a balancing process of the varying interests involved. The doctor has an interest in being able to pursue his profession which requires that the necessary facilities be available to him. The hospital is interested in preserving its autonomy and in maintaining quality control in its medical staff. The public's interest lies in the perpetuation of that quality control and, in the sense that its services are and remain available to those in need, in the productivity of the hospital.[8]

The purposes and interests of everyone concerned would be defeated if hospitals were required to engage in excessively burdensome procedures in screening staff applicants. However, due process, in this context, requires that a fair and thorough consideration be made of a doctor's application for initial appointment or reappointment to the staff. Therefore, a hearing before the deciding board must be provided. It is not possible that such a hearing require all the aspects of a formal judicial or quasi judicial hearing. Although a

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[8]Justice Abe concurring herein states that HRS § 453-8 (Supp. 1971) sets forth a "comprehensive scheme" to determine whether a physician continues to be competent. It should be pointed out that this statute does not provide for systematic periodic review of a doctor's skill and performance but merely provides for the revocation or suspension of a doctor's license. Inherent within the mechanics of HRS § 453 is the fact that it does not become operative until someone has accepted the burden of challenging a doctor's right to retain his license. Aside from other criteria that are not directly related to a doctor's competency as a physician, HRS § 453-8(12) provides that "professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery" are sufficient grounds for the state board of medical examiners to revoke or suspend a doctor's license. Under Justice Abe's view "no Hawaii hospital" could deny a licensed doctor privileges or refuse to renew his privileges regardless of whether the doctor was in fact too incompetent or incompatible to provide the quality of care the hospital board itself strives to maintain. The hospital board, in order to deny such a doctor privileges, would first have to wait until the doctor performed a particular act sufficient to constitute "gross carelessness" or the like in the eyes of the state board of medical examiners. Then the hospital board would have to initiate revocation of license proceedings and subsequently be successful in having the doctor's license revoked. The majority does not feel that it is either practically reasonable or legally sanctionable to impose such a burden on either what has been earlier characterized in this opinion as a truly private hospital or on a private hospital that has received government funds but has provided the applicant a valid hearing.

hospital board does not have the power to subpoena witnesses or administer oaths, certain procedural safeguards must be provided. The doctor should be on notice that a hearing is available to him. He should be given timely notification sufficiently prior to the hearing for him to adequately prepare a defense. In conjunction with such notice, a doctor whose privileges are being revoked or who is being denied reappointment should be provided a written statement of the charges against him. Such statement should be sufficiently adequate to apprise him of the specific charges against him. A doctor who is being denied initial appointment to a hospital staff should be provided a written statement specifying the reasons his application is being denied.

Because a hospital board has no subpoena power, there can be no right to confront and cross-examine persons who have made adverse statements of a doctor unless such persons testify at the hearing. However, a doctor should have the right to call his own witnesses.

It should be within the discretion of the hospital board as to whether counsel may attend the hearing and participate in the proceedings. Participation of counsel would probably not be necessary unless the hospital's attorney is used in the proceedings or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous. Such a limitation would not preclude a doctor from consulting an attorney prior to the hearing even though the attorney was not allowed to participate in the hearing itself.

The basis for the decision of the board must come from substantial evidence which was produced at the hearing. As such the board cannot rely on *ex parte* communications that were not made known to the doctor in question. The utilization of such material would render ineffective the doctor's right to answer the charges upon which the denial of his staff privileges are based.

The decision of the board should be written, including the basis for the decision, thus providing a record for judicial review.

SUPREME COURT OF HAWAII

Opinion of the Court

DISPOSITION OF PRESENT CASE

In the present case appellant was granted staff privileges apparently on a probationary basis for a period of one year. At the end of that period it was decided that such privileges not be renewed. It is our opinion that appellant was not afforded procedural due process. Although a hearing was provided appellant, it was patently defective.

Presumably among the significant factors to be considered by a hospital board at a reappointment or revocation of privileges hearing would be included the previous performance of the doctor at the hospital. A year's time, as in this case, would appear to be a sufficiently long period for specific charges to develop against appellant if his denial of privileges were to be justified. And yet in this case, prior to the termination of appellant's privileges, appellant was never provided with specific written charges as to why his performance was not deemed acceptable. He was merely read an indictment of general allegations at the hearing. In order for appellant's right to a hearing to be effective he must have been apprised of the particulars of the specific claims against him prior to the hearing. In this case appellant had no opportunity to investigate the basis for his performance being questioned. As such his right to present a defense was rendered nugatory.

It is clear from the record of this case that the hospital board made its decision as to the renewal of appellant's privileges prior to the ineffective hearing granted appellant. Such a procedure cannot be considered satisfactory. A final decision to revoke privileges or not reappoint, made by the ultimate governing body, the hospital board, must come after the requisite hearing is provided. In order for the board to function as an objective decision making body in its capacity as grantor of staff privileges it must not be tainted by its own premature decisions prior to the hearing.

We do not reach the issue whether in this case the decision of the board, aside from the fact that the hearing was not adequate, was based on insubstantial evidence, resulting in an arbitrary, capricious or unreasonable exclusion amount-

ing to an abuse of discretion. Appellant clearly was denied procedural due process. Although this case is appealed from the decision of the court in the jury trial below, equitable relief having been prayed for, it is appropriate to grant such a remedy. Therefore this case is remanded for the trial court to grant an injunction against appellee, reinstating appellant with his temporary staff privileges.

Joseph A. Ryan (*Ryan & Ryan* and *Edward Y. N. Kim* of counsel) for plaintiff-appellant.

Dennis E. W. O'Connor (*John A. Hoskins* with him on the brief; *Anthony, Hoddick, Reinwald* and *O'Connor* of counsel) for defendants-appellees Castle Memorial Hospital, et al.

Edmund Burke (*George Richard Morry* with him on the brief; *Conroy & Hamilton* of counsel) for defendant-appellee John J. Lowrey, M.D.

Richard E. Stifel (*Jenks, Kidwell, Goodsill* and *Anderson* of counsel) for defendants-appellees Robert A. Rose, J.I.F. Reppun, Don E. Poulson and Ralph B. Cloward.

Richard Hirai (*Walter G. Chuck* and *Henry I. Kuba* on the brief; *Chuck & Fujiyama* of counsel) for defendant-appellee Great American Insurance Company.

CONCURRING OPINION OF ABE, J.

I begin with the propositions that acts of hospitals performing "public functions"[1] or receiving government funds are state action and that such hospitals are therefore subject to the requirements of the Due Process Clause and may deny a physician the liberty to practice medicine only if they have a rational basis for doing so and act pursuant to fair procedures.

I would hold that whenever a physician is in compliance with the requirements for licensing of the State Board of Medical Examiners, no Hawaii hospital subject to the Due

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[1]Marsh v. Alabama, 326 U.S. 501 (1946); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Smith v. Allwright, 321 U.S. 649 (1944).

Process Clause may completely deny him the right to admit and treat patients.

In my opinion, there is little need to allow hospitals to set up committees empowered to deny staff privileges to licensed physicians. The licensing of physicians has been preempted by the State and adequate procedures are already established by statute to determine whether or not a physician continues to be competent. As I read our statutes, any hospital, doctor, or other interested person may institute proceedings under HRS § 453-8 (Supp. 1971) to have a physician's license revoked or partially revoked. The Board of Medical Examiners, a select committee of physicians appointed by the Governor, then determines whether a physician's license should be revoked or suspended. Chapter 453 contains the detailed procedural protections which the majority favors, such as notice, opportunity for a hearing, and a subpoena power for both the board and the physician, and it allocates the burden of proof to the hospital, as Justice Levinson desires. The fact that the legislature has established a comprehensive scheme to determine whether or not a physician continues to be competent indicates that there is little need to allow hospitals to make a second determination of whether or not a physician is competent.

Against the positive need for hospital supervision of the competence of physicians, I weigh the risks of giving such supervisory powers to hospitals. Whenever a hospital appoints a group of its doctors to a "credentials committee" and empowers them to supervise the competence of other doctors, there is a grave danger that the members of the committee will seek to exclude doctors because they are competitors, because they are Black, or Jewish, or Haole or Oriental, because they have testified against them in malpractice suits, or simply because they do not like them. Requiring a credentials committee to act out a charade of seemingly fair procedures does little to minimize the danger that the committee will draw its conclusion for reasons not present in the record and that danger exists regardless of where the burden of proof is allocated. The root problem

is that a credentials committee can never be expected to act with the disinterestedness of the Board of Medical Examiners.

Weighing the very marginal gains to be had by allowing hospitals to completely exclude licensed physicians against the risks attending the power, I conclude that hospitals that are subject to the Due Process Clause have no rational basis for excluding licensed physicians.

This resolution does not create a risk that a hospital will be liable for the negligence of its physicians, yet lack the capacity to exclude them. With the possible exception of one decision,[2] courts have always held that a hospital is not liable for the negligent acts of the physicians who are not employed by the hospital.[3] The ordinary physician is not the hospital's "servant" because the hospital has no "right to control" the acts of an "independent contractor." Since the hospital is not liable for the independent physician's negligence, it has no need to guarantee that he is competent.[4]

The danger that the hospital's admission of a physician to its staff will encourage patients to seek the services of a doctor who may be incompetent is also chimerical. Patients

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[2]Darling v. Charleston Community Memorial Hospital, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964), *aff'd*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

[3]Moon v. Mercy Hospital, 150 Colo. 430, 373 P.2d 944 (1962); Cornelius v. Sinai Hospital of Baltimore, Inc., 219 Md. 116, 148 A.2d 567 (1959); Minogue v. Rutland Hospital, Inc., 119 Vt. 336, 125 A.2d 796 (1956); Keene v. Methodist Hospital, 324 F. Supp. 233 (D.C. Ind. 1971); Bulloch County Hospital Authority v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971).

[4]Hospitals are, of course, liable for their own negligent acts, *South Highlands Infirmary v. Camp*, 180 So. 2d 904 (Ala. 1965); *Schuster v. St. Vincent Hospital*, 45 Wis. 2d 135, 172 N.W.2d 421 (1969); *Weeks v. Latter-Day Saints Hospital*, 418 F.2d 1035 (C.A. Utah, 1969), or for the negligence of interns, residents, emergency room physicians, and the like who are actually employed by the hospital. *New Biloxi Hospital, Inc. v. Frazier*, 245 Miss. 185, 146 So. 2d 882 (1962); *Bing v. Thunig*, 163 N.Y.S.2d 3, 2 N.Y.2d 656, 143 N.E.2d 3 (1957). Since salaried physicians are subject to the hospital's control, the doctrine of *respondeat superior* applies and the hospital has both a right and a duty to examine the competence of employees it hires on a salaried basis. A number of jurisdictions hold that a hospital is not liable for the acts of even a salaried physician, on the theory that, since medicine is a field of great expertise, hospitals have no "right to control" any doctor, salaried or not. *See e.g.*, Brown v. Moore, 143 F. Supp. 816 (W.D. Pa. 1956).

are admitted to hospitals only *after* they have chosen a doctor. Even in emergency rooms, patients are treated either by doctors in the employ of the hospital, or by a physician of their own choosing.

Nor do I see a danger that a single hospital will be flooded with excessive numbers of doctors and patients. It seems preferable to allocate facilities to those patients who are neediest or on a first-come, first-serve basis, rather than to allow arbitrary admission of patients of self-selected physicians.

This court should recognize that hospitals are not clubs. Incumbent doctors do not need the power to exclude newcomers. Licensed physicians ought to be able to freely admit patients to any hospital of the patient's choosing. Also, we should recognize the right of a patient to have a doctor of his own choice attend him and we should eliminate factors that may hamper or hinder such right.

I concur in the holding that it was error for the court to grant a directed verdict allowing the hospital to completely exclude Dr. Silver, and error to fail to grant an injunction restraining Castle Memorial Hospital and the members of its credentials committee from completely denying Dr. Silver the right to admit patients.

CONCURRING OPINION OF LEVINSON, J.

I join in the holding of the court that the decision of the governing body of Castle Memorial Hospital to revoke the appellant's staff privileges is subject to judicial review and that an injunction should issue reinstating him to the position which he occupied prior to the revocation proceeding. I also subscribe to the guidelines laid down in the opinion of the court restricting the administrative discretion of the hospital board and extending procedural protections to a physician whose staff privileges are at issue. I would, however, go further.[1]

I would hold in plain language that a physician licensed

[1] I understand my Brother Abe's position to be that all licensed physicians must be accorded staff privileges to practice in any public or quasi-public hospital, without regard to additional indicia of medical qualifications or performance. De-

by the State of Hawaii under HRS ch. 453 is presumed qualified to engage in the general practice of medicine. When a physician is in a specialty certified by the American Board of Medical Specialties, I would extend the presumption to that particular specialty. Thus, a hospital which has received public funds[2] would be required to grant the application for staff privileges of any board certified and/or licensed physician, unless it can adduce clear and convincing evidence that the physician lacks the requisite medical qualifications. I emphasize that the burden should be upon the hospital to adduce such evidence. I interpret the opinion of the court to be consistent with what I have said in this paragraph.

The hearing at which a physician's right to staff privileges is determined must comport with the dictates of due process. The physician may not be held to a more stringent standard of performance than are other staff members. In addition to timely notice and a written statement of the specific charges against him, I would hold that a physician is entitled to the representation of counsel and an opportunity to cross-examine all witnesses against him in all proceedings affecting his right to staff privileges. The conduct of an adequate defense is obviously impossible if the physician cannot confront and cross-examine adverse witnesses. A hospital's lack of subpoena power would not prevent the trier of fact from declining to consider evidence offered by a staff member who does not have the courage and willingness to subject himself to cross-examination.

I am satisfied from reading the entire record that Castle Memorial Hospital subjected Dr. Silver to a kafkaesque "kangaroo court," called at the eleventh hour in an effort to comply with the hospital's own by-laws and to rationalize a result which its board of trustees had already reached. Such proceedings are constitutionally intolerable.

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spite the appeal inherent in all absolutist positions, I believe that the respective interests of hospital, physician, and public are susceptible to more flexible reconciliation.

[2] I express no opinion as to the standard which should be applied to those hospitals which receive no public funds.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-573

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

BRIEF IN OPPOSITION OF RESPONDENTS, THE QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D., TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the issues regarding the dismissal of the Petitioners' claims of alleged violations of 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 are properly before this Court.
2. Whether the Hawaii Supreme Court's ruling regarding the state peer review statute, Section 663-1.7, Haw. Rev. Stat., was based on an independent and adequate nonfederal ground.
3. Assuming that the Petitioners properly raised the alleged violations of 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 before the state courts, do the Petitioners state a claim upon which relief may be granted given this Court's rulings in Rendell-Baker v. Kohn, 457 U.S. 830 (1982) and General Investment Co. v. Lake Shore and Michigan Southern Ry. Co., 260 U.S. 261 (1922).

LIST OF PARTIES

Petitioners are THAN TUN, M.D. and THIDA SWE TUN.

Respondents are KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation; KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER; RICHARD DAVI, Individually and as President of Kapiolani Women's and Children's Medical Center; PAUL E. COOK, Individually and as Executive Vice President of Kapiolani Women's and Children's Medical Center; WALTON K.T. SHIM, M.D., Individually and as Chief of Staff of Kapiolani Women's and Children's Medical Center; STANLEY M.K. CHUNG, M.D., Individually and as Chief of Surgery of Kapiolani Women's and Children's Medical Center; THE QUEEN'S MEDICAL CENTER, A Hawaii nonprofit corporation; JON PEGG, M.D., Individually and as Chairman of

Anesthesiology Credentials Committee, The Queen's Medical Center; DAN YOSHIOKA, M.D., Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and ARTHUR SPRAGUE, M.D., Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center.

Petitioners' Petition for Writ of Certiorari states that Mitsuo Hattori, M.D. is not a respondent herein.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
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vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; et al.,

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_____

Respondents, the Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. respectfully request this Court deny the Petition for Writ of Certiorari, which seeks review of the unpublished Memorandum Opinion of the Supreme Court of Hawaii, filed on June 17, 1986, and reprinted herein as Appendix B. The Judgment on Appeal, entered on August 16, 1986 is reprinted herein as Appendix D.

This Brief in Opposition is submitted on behalf of Respondents the Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. (hereinafter collectively "Queen's Medical Center"), to the Petition for a Writ of Certiorari filed on behalf of THAN TUN, M.D. and THIDA SWE TUN (hereinafter "Petitioners").

JURISDICTION

This Court does not have jurisdiction to grant Petitioners' Writ of Certiorari under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Hawaii Constitution Art. 1, Section 5; Section 663-1.7. Hawaii Revised Statutes; Rule 56, Hawaii Rules of Civil Procedure; 42 U.S.C. Section 1983; 15 U.S.C. Section 1; Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On or about June 17, 1982, Dr. Than Tun submitted his application for admission to the medical staff of Queen's Medical Center and for clinical privileges in anesthesiology (R. 98-100). (R. refers to Record on Appeal at the designated page, to

be certified by the Clerk of the Hawaii Supreme Court.)

As part of the application process, Dr. Tun received a printed copy of the Queen's Medical Center's Constitution and By-laws of the Medical and Dental Staff ("By-laws"). On June 15, 1982, Dr. Tun signed an acknowledgment that he was in receipt of said By-laws and that he agreed to be bound by the terms provisions of the rules and regulations of the Queen's Medical Center's medical and dental staff (R.98).

Dr. Tun was granted temporary clinical privileges in anesthesiology with observation for a one-month period beginning on June 18, 1982 (R. 89). According to the Queen's Medical Center's Constitution and By-laws, the granting of temporary clinical privileges did not confer staff membership on Dr. Tun. (R. 99).

Temporary clinical privileges were granted Dr. Tun in thirty-day increments

while Queen's Medical Center continued to process his application. Each thirty day privilege period was subject to review, evaluation and approval before it was extended (R. 90).

Dr. Tun was granted temporary privileges without observation for the following periods:

July 12, 1982 to August 10, 1982

August 11, 1982 to September 9, 1982

September 3, 1982 to October 2, 1982

October 3, 1982 to November 1, 1982

(R. 90)

As part of the peer review process, Queen's Medical Center conducted an investigation of the applicants' character, qualification and standing in the medical profession. Dr. Tun authorized Queen's Medical Center to make such an inquiry at other local medical facilities, licensing agencies, professional associations and medical practitioners who had information

regarding Dr. Tun's professional qualifications, clinical competence and moral and ethical character (R. 100).

Dr. Tun agreed to release from liability all representatives of Queen's Medical Center and/or its medical-dental staff for actions taken in good faith and without malice in connection with the evaluation of Dr. Tun's application, credentials and qualifications (R.100).

As part of Queen's Medical Center's review process, a questionnaire was mailed to all physicians at Queen's Medical Center in September, 1982. Dr. Tun also received said questionnaire (R. 101).

On his completed questionnaire, dated September 27, 1982, Dr. Tun indicated that he had no suspensions, restrictions, revocations or denial of privileges at any hospital (R. 101).

On October 22, 1982, as part of the routine request to area hospitals for

information regarding Dr. Tun, Kapiolani Children's Hospital ("Kapiolani") responded to Queen's Medical Center's request.

Kapiolani's report stated that Dr. Tun's application for provisional privileges at Kapiolani was denied following the termination of his temporary privileges granted for the June 23, 1982 to July 9, 1982 period.

Kapiolani's response to Queen's Medical Center's inquiry indicated that Dr. Tun's application for provisional privileges at that hospital was rejected following the termination of temporary privileges on July 9, 1982. Kapiolani's response further indicated that Dr. Tun had not satisfactorily completed Kapiolani's observation-probation requirements. The Kapiolani evaluator concluded that, "I don't believe Dr. Tun is ready to give anesthesia

for children unless he seeks further training in the field of pediatric anesthesiology". (R. 102).

Following the receipt of the Kapiolani evaluation and during Queen's Medical Center's continued processing of his application, Dr. Tun, on October 29, 1982, was granted temporary clinical privileges at Queen's Medical Center on the following conditions for the period October 20, 1982 through November 29, 1982:

> Anesthesiology for adult cases, without observation. Anesthesiology for newborn and pediatric cases, with observation.

The temporary privileges were granted Dr. Tun for the following periods:

November 30, 1982 to December 29, 1982

December 30, 1982 to January 29, 1983

(R. 92).

On January 28, 1983, Queen's Medical Center was informed that Dr. Tun had retained an attorney to represent him in

regard to his application for privileges. Dr. Tun confirmed this action by letter received on February 14, 1983 (R. 103).

Queen's Medical Center continued to process Dr. Tun's application. Dr. Tun was granted temporary clinical privileges limited to anesthesiology for adult cases, without observation for the following periods:

January 30, 1983 to March 2, 1983

March 31, 1983 to April 1, 1983

April 2, 1983 to May 1, 1983

(R. 92, 93)

Dr. Tun was notified on April 4, 1983, by certified mail that Queen's Medical Center's Anesthesiology Credentials Committee had met to review his application for staff membership and clinical privileges in anesthesiology. (R. 105-108).

Dr. Tun was advised in said letter of April 4, 1983 that following an evaluation of the information contained in his file, the Anesthesiology Credentials Committee

recommended that his application be approved on the following basis:

1. Anesthesiology for adult cases, without observation.

2. Anesthesiology for pediatric cases (under age 10), with observation, for a minimum of two cases at the Medical Center involving the use of the general inhalational anesthetic technique.

3. Provisional staff membership status, anesthesiology service

The Credentials Committee went on to observe:

> The above recommendation for anesthesiology for adult cases, without observation, is based on your satisfactory completion of observation requirements for cases at Queen's Medical Center involving anesthesiology for adults.
>
> It was recommended that your privileges for anesthesiology for pediatric cases (under age 10) be granted with observation based on documentation received which raises questions to your being granted clinical privileges without observation in anesthesiology for the above-described pediatric cases at this time.

(R. 105).

Dr. Tun was advised in the letter that he had a right to meet with the Anesthesiology Credentials Committee. The letter declared:

> The recommendation of the Anesthesiology Committee, if approved, would be less than that for which you have made application and is, therefore, considered an adverse recommendation. As such, in accordance with our due process procedures, this is to notify you of your opportunity to meet with the Credentials Committee for mutual discussion and review of the basis upon which the above recommendation was made, prior to finalization.

(R. 105) (emphasis supplied).

Dr. Tun's right to convene an informal hearing with the Anesthesiology Credentials Committee was provided for in Chapter 1, Section A, 1.02(c) of the By-laws (R. 104):

> c. If an adverse recommendation is made by a Credentials Committee, an informal meeting shall be scheduled by the Credentials Committee to meet with the applicant, if the applicant so desires, during which the applicant shall be informed of the reasons for the adverse recommendation.

Attached to the Queen's Medical Center's April 4, 1983 letter to Dr. Tun was a form letter which Dr. Tun could use to request a hearing before the Credentials Committee. (R. 108).

Dr. Tun availed himself of the opportunity to meet with the Anesthesiology Credentials Committee and a hearing was scheduled for October 4, 1983 (R. 93).

Following the October 4, 1983 meeting and subsequent clarifying correspondence with Dr. Tun, the Anesthesiology Credentials Committee recommended that Dr. Tun's application for privileges be denied (R. 93-94). Dr. Tun was notified of the adverse recommendation (R. 145).

Queen's Medical Center's Medical Executive Committee, the 27 member reviewing committee composed of 1 anesthesiologist and representatives of 26 other departments or services, met on February 2, 1984 and

reviewed Dr. Tun's application for privileges (R. 110).

The Medical Executive Committee notified Dr. Tun on February 21, 1984 of its decision to accept the recommendation of the Anesthesiology Credentials Committee, that Dr. Tun's application be denied based on serious questions regarding his ethical conduct in responding to Queen's Medical Center's September, 1982 questionnaire.

Dr. Tun was advised in the February 21, 1984 letter that in accordance with Section A, Chapter I of the By-laws (R.109), that he had the right to request an informal hearing with the Medical Executive Committee (R. 110).

Dr. Tun requested such a meeting with the Medical Executive Committee. After several scheduling delays requested by Dr. Tun, Dr. Tun's hearing with the Medical Executive Committee was eventually scheduled for October 30, 1984. (R. 95).

Notice of Dr. Tun's hearing before the Medical Executive Committee was sent to Dr. Tun by certified mail on October 5, 1984 (R. 113).

Dr. Tun was advised in said October 5, 1984 letter that:

> After the informal hearing the Medical Executive Committee will make a recommendation to the Queen's Medical Center's Board of Directors. If that recommendation following such informal hearing is still adverse you will be entitled to a full hearing by the Board of Directors before the Board of Directors makes a final decision on the matter. See section 1.07 of the Bylaws.

(R. 113, 114).

Rather than proceed with Queen's Medical Center's peer review process, Dr. Tun did not attend the requested October 30, 1984 hearing of the Medical Executive Committee.

On November 9, 1984, Dr. Tun was advised by certified mail that he had a right to a full hearing before the Board of Directors.

While Dr. Tun's application was proceeding through Queen's Medical Center's review process, Dr. Tun and his wife filed their Complaint in the Circuit Court of the First Circuit. On August 22, 1984, the First Amended Complaint was filed.

Concurrently with the filing in the state court, the Petitioners filed a complaint in the United States District Court for the District of Hawaii on August 10, 1984, The federal action was dismissed with prejudice by the Petitioners on December 10, 1984.

Queen's Medical Center moved for summary judgment and dismissal in the state court action, and Judge Frank Takau granted said Motion to Dismiss on December 6, 1984 (Appendix A, "Order Granting Defendants' Queen's Medical Center Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D., and Arthur Sprague, M.D's Motion to Dismiss Complaint for Failure to State a Claim upon Which

Relief Can Be Granted"). The Petitioners appealed the Circuit Court's ruling to the Hawaii Supreme Court. On June 17, 1986, the Hawaii Supreme Court sustained the Circuit Court's Order granting Queen's Medical Center's Motion to Dismiss. (Appendix B, "Unpublished Memorandum Opinion of Hawaii Supreme Court"). The Petitioners' Motion for Reconsideration was denied by the Hawaii Supreme Court on July 7, 1986. (Appendix C, "Order") and the Judgment on Appeal was entered on August 16, 1986 (Appendix D, "Judgment on Appeal").

I. REASONS FOR DENYING THE PETITIONERS' WRIT OF CERTIORARI

The Petitioners' Writ of Certiorari presents no substantial federal question for this Court's review. The issues regarding the Petitioners' 42 U.S.C. Section 1983 (civil rights) and 15 U.S.C. Section 1 (antitrust) claims are not properly before

this Court because (1) as to the Petitioners' federal antitrust claim, the Hawaii state courts have no jurisdiction, and (2) the Petitioners never "pressed" nor did the state courts "pass" upon the issues raised in the Writ of Certiorari. With respect to the Petitioners' claims regarding the state peer review statute, Section 663-1.7, Haw. Rev. Stat. (Appendix H), and the exhaustion of administrative remedies, the Hawaii Supreme Court's rulings on those claims were based on independent and adequate state grounds.

A. This Court Lacks Jurisdiction To Adjudicate This Appeal Because The Petitioners Failed To "Press" And the State Courts Did Not "Pass" Upon The Issues Raised In The Petition For Writ Of Certiorari

This Court has maintained that its jurisdiction over decisions from state courts derives from 28 U.S.C. Section 1257. In McGoldrick v. Compagnie Generale, 309 U.S. 430, 434-5 (1940), this Court set forth its

policy with respect to exercising its appellate jurisdiction in cases coming from the federal courts. In McGoldrick v. Compagnie Generale, supra, the Court declared that it would not consider questions raised by petitioners' writ of certiorari "not pressed or passed upon in the courts below."

In cases coming from state courts in which a state statute is challenged as unconstitutional, this Court has maintained the policy that it will desist from deciding questions not presented or decided in the state supreme court. Where the constitutionality of a state statute has been upheld by the highest state court, the Supreme Court has refused to consider any grounds of attack not raised or decided in the state supreme court.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court noted that it had:

> held early on that Section 25 of the Judiciary Act of 1789 furnished

> us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in Crowell v. Rendell, 10 Pet. 368, 391, 9 L.Ed. 458 (1836), 'If both of these requirements do not appear on the record, the appellate jurisdiction fails.'

The then Justice, now Chief Justice Rehnquist observed in Illinois v. Gates at 462 U.S. 218, n.1, that the strict rule of Crowell v. Rendell, supra, that the federal question had to be both raised and decided in the state court below, was later modified so that this Court would not consider a claim unless it had been either raised or squarely considered and resolved in the state court proceedings. Last term, in Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1986), this Court declined to decide an issue because the petitioner failed to claim lack of jurisdiction in his petition to the Alabama Supreme Court and raised the claim for the first time in his petition to this Court. Justice O'Connor found that:

> [e]ven if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court,...the longstanding rule that this court will not consider such claims creates, at the least, a weighty presumption against review

Ibid, pp. 436-37. (citations omitted).

In the case at bar, the Petitioners failed to raise or argue the 42 U.S.C. Section 1983 (civil rights) and 15 U.S.C. Section 1 (antitrust) claims in the state courts and now raise these issues for the first time in this Court. Most of the issues raised by the Petitioners' Writ of Certiorari, including the requirement of exhaustion of administrative remedies in the context of a 42 U.S.C. Section 1983 action (i.e., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)); the proper standard of review for an order of dismissal or summary judgment in the context of a 42 U.S.C. Section 1983 claim; or the alleged bias of

the peer review process at Queen's Medical Center, were not presented, pressed or passed upon in the state court litigation. It was only in the Writ of Certoriari that the Petitioners first raised these federal law issues. Since none of the federal issues now raised by the Petitioners, and specified below, were raised, briefed or decided in the Hawaii Supreme Court, this Court should deny the Petitioners' Writ of Certiorari under the doctrine of Crowell v. Rendell, supra, Illinois v. Gates, supra; and Heath v. Alabama, supra.

B. The Rulings of the Hawaii Supreme Court Rest Upon Independent and Adequate State Grounds

All of the issues properly raised by the Petitioners in the state circuit court or Hawaii Supreme Court, were disposed of by the Hawaii Supreme Court on independent and adequate state grounds and raise no federal questions reviewable by this Court. It is a

longstanding principle of adjudication that this Court will not review a state court judgment which rests upon two grounds, one federal and the other nonfederal, if the nonfederal basis is independent of the federal ground and adequate to support the state court judgment. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 489 (1965); Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917).

The Petitioners have alleged, inter alia, that the Hawaii state courts employed an improper procedural or evidentiary standard in reviewing Queen's Medical Center's Motion for Dismissal. However, in reviewing the Petitioners' argument with respect to the evidence proffered by the Petitioners, in opposition to Queen's Medical Center's Motion to Dismiss, and the failure to accord the Petitioners' due process, the Hawaii Supreme Court relied upon independent

and adequate nonfederal grounds as the basis for their ruling. The Petitioners' due process contentions were acknowledged, recognized and reviewed by the Hawaii Supreme Court. See, Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972) cert. denied, 409 U.S. 1048 (1972), reh. denied, 409 U.S. 1131 (1973) and Appendix B-9. The Petitioners did not cite nor rely upon the Federal Constitution in their pursuit of their due process claim in the Hawaii Supreme Court. The Hawaii Supreme Court's reliance upon Silver v. Castle Memorial Hospital, supra, evidences the independent and adequate nonfederal basis for that Court's ruling that the Petitioners were not deprived of their due process rights under Article I, Section 5 of the Hawaii State Constitution.

The Petitioners refer this Court to decisions relating to their 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 claims to

support their contention that the Hawaii state courts used an improper evidentiary standard in determining whether there was "a genuine issue of material fact" under Rule 56, Hawaii Rules of Civil Procedure (Appendix G).

Queen's Medical Center contends (1) that these purported federal issues, the 42 U.S.C. Section 1983 and federal due process claims, were neither "pressed nor passed upon" by the state courts; (2) the Petitioners did not press their alleged 42 U.S.C. Section 1983 civil rights claims in the state courts; (3) the Petitioners did not, and could not, press their federal antitrust claims in the state courts, and any ruling on the Petitioners' state antitrust claims was based on independent and adequate nonfederal grounds; (4) the Petitioners' claims that the peer review process was constituionally defective because of "bias" on the part of the Queen's Medical Center

personnel was never raised, argued or ruled upon by the Hawaii Supreme Court; and (5) the disposition of the Petitioners' claims with respect to Section 663-1.7, Haw. Rev. Stat. (Appendix H), and the Hawaii Supreme Court ruling on that issue, rested on independent and adquate nonfederal grounds and hence is not now reviewable by this Court.

1. The Petitioners Do Not Have a 42 U.S.C. Section 1983 Action as to Actions and Decisions of the Queen's Medical Center

The Petitioners' claim that the peer review process of Queen's Medical Center violated their federal civil rights, 42 U.S.C. Section 1983. The Petitioners assert that the action of Queen's Medical Center is "state action" and hence all decisions and actions of the institution are subject to the due process requirements of the Fourteenth Amendment to the United States Constitution and any violation of the federal due process

requirements subjects Queen's Medical Center to 42 U.S.C. Section 1983 liability. The Petitioners' attempt to support their contention that the acts of Queen's Medical Center are "acts of the state" on the grounds that the Queen's Medical Center receives Hill-Burton funds, as well as federal and state funds under Medicare/Medicaid programs and state and federal tax exemptions as a non-profit private hospital. (Petitioners' Writ of Certiorari, pp. 44-46). Citing various cases, the Petitioners conclude that the receipt of Hill-Burton funds and participation by the states through the grant of tax exempt status constitutes "state action" or involvement sufficient to subject Queen's Medical Center to the due process requirements of the Fourteenth Amendment and 42 U.S.C. Section 1983 liability for any violation of a claimant's due process rights.

However, in reaching the conclusion that the receipt of federal funds and the granting of tax exempt status subject Queen's Medical Center to the requirements of the Fourteenth Amendment and Section 1983 liability, the Petitioners failed to consider Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In Rendell-Baker v. Kohn, supra, this Court held that the petitioner's discharge by a private school, which received federal funds, did not make the school's employee-discharge decisions acts of the "state" for purposes of 42 U.S.C. Section 1983 liability. Using the test developed in Blum v. Yaretsky, 457 U.S. 991 (1982), this Court concluded that the school was not fundamentally different from many private corporations whose business depended primarily on government contracts and whose acts did not become acts of the state by reason of the significance or even total engagement in performing public contracts. The school's decision to

discharge the petitioners was not compelled or even influenced by any state regulation and the fact that the school performed a public function in educating maladjusted high school students did not, according to this Court, make the school's acts "state action". Finding no "symbiotic relationship" between the school and the state as the Court found in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court concluded that the discharged employees did not have a 42 U.S.C. Section 1983 claim against the school based on the financial relationship between the private organization and the government. Rendell-Baker v. Kohn, 457 U.S. at 843.

The Petitioners' "state action" claim appears for the first time in their Petition for a Writ of Certiorari and was never "pressed" nor "passed" upon by the Hawaii Supreme Court. Had the Petitioners raised the "state action" issue in a timely

fashion in the state courts, the issue might be reviewable by this Court. Failing to raise the 42 U.S.C. Section 1983 claim in the state courts, the Petitioners cannot now raise it for the first time in this Court through a petition for writ of certiorari.

Even if we assume, en arguendo, that Queen's Medical Center was subject to the Fourteenth Amendment and Section 1983 liability for violating the Petitioners' civil rights, this Court has never held that a state court must entertain a Section 1983 action, See Martinez v. California, 444 U.S. 277, 283-84, n.7, and if a state court does entertain such federal actions, the state court may employ its own procedural rules. In fact, the general rule is that where a state court accepts jurisdiction over a claim based on federal rights, the federal matter must be presented to the state courts in accordance with the requirements of the state's procedural rules. As this Court

has often said, state law and practice "are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law". John v. Paullin, 231 U.S. 583, 585 (1913); Wolfe v. State of North Carolina, 364 U.S. 177, 194-95 (1960); New Jersey v. Potash, 440 U.S. 450, 455 (1979). Thus even if the Petitioners had properly raised the 42 U.S.C. Section 1983 claim in the state courts, the Hawaii Supreme Court was justified in using the state procedural standards for determining whether the adverse or non-moving party, the Petitioners herein, set forth specific facts showing that there was a genuine issue for trial. That determination is a procedural issue which is a matter for the forum court and does not raise a reviewable federal issue. 1/

1/ The Petitioners have not raised the issue that the Hawaii Rules of Civil

2. The Petitioners Did Not, As A Matter Of Law, Have a Federal Antitrust Claim

The Petitioners also contend that the Hawaii Supreme Court improperly sustained the trial court's order of dismissal on the Petitioners' federal antitrust claim. (Petitioners' Writ of Certiorari pp. 35-36). Queen's Medical Center submits that the dismissal of the Petitioner's antitrust claim does not raise any federal question

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1/ (cont'd)

Procedure eviscerate the interests or policy of the federal statute. Cf. Dice v. Akron Canton & Youngstown Railroad, 342 U.S. 359 (1952); Brown v. Western Railway, 338 U.S. 294 (1949) (Federal Employers' Liability Act cases involving state procedural rules). The Petitioners seem to argue that the Hawaii state courts were required to use the federal standards for granting or denying a motion to dismiss or summary judgment. In any event, the standards of Rule 56, Haw. R. Civ. P. would appear consistent with this Court's latest rulings on motions for summary disposition of complex cases. Cf. Anderson v. Liberty Lobby, Inc., ___ U.S. ___, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 1548 (1986).

sufficient to invoke the appellate jurisdiction of this Court because: (1) the Hawaii state courts did not have jurisdiction to hear and determine a Sherman Act antitrust claim, 15 U.S.C. Section 1; (2) the issue related to the federal antitrust claim was neither "pressed or passed upon" in the state court proceedings; and (3) the Hawaii Supreme Court's disposition of the Petitioners' state treble-damage antitrust claim, Chapter 480, et. seq., Haw. Rev. Stat., on the ground that the pleadings and record did not raise a genuine issue of material fact, rested on an interpretation of state law, which is not reviewable by this Court.

At page 36 of the Writ of Certiorari, the Petitioners assert that the state court First Amended Complaint of August 22, 1984 alleged violations of the Sherman Antitrust Act. The First Amended Complaint charged Queen's Medical Center with certain violations of the antitrust laws.

From this the Petitioners, referencing Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); White Motor Company v. United States, 372 U.S. 253 (1963) and other cases cited at the Writ of Certiorari, pages 35-38, conclude that the state court improperly granted Queen's Medical Center's Motion for Dismissal. This discussion and the precedents cited therein might have been material and relevant if the Petitioners were appealing a federal court's dismissal of their federal antitrust claims. However, the Petitioners' federal claims were voluntarily dismissed with prejudice in the federal court. 2/ (Appendix E). Given the

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2/ The Petitioners' federal court Complaint alleging the Queen's Medical Center's violation of the Sherman Act was dismissed with prejudice by the petitioners on December 10, 1984. The only antitrust claims that could have been "pressed and passed

longstanding precedents of this Court, the Hawaii state courts had no jurisdiction to hear and determine the Petitioners' federal treble damage action. In fact, since 1922 this Court has held that the federal courts have the exclusive jurisdiction over any and all Sherman Act claims. General Investment Co. v. Lake Shore and Michigan Southern Ry Co., 260 U.S. 261 (1922).

The Petitioners could not, as a matter of law, have adjudicated their Sherman Act claims in the Hawaii state courts because there was no subject matter jurisdiction over their "federal antitrust claim" in the state Circuit Court or Hawaii Supreme Court. Thus

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2/ (cont'd)

upon" by the Hawaii Supreme Court were the Petitioners' state antitrust claims, Chapter 480, Haw. Rev. Stat., which do not raise a federal question sufficient to invoke appellate the jurisdiction of this Court.

the Petitioners' argument that the Hawaii state courts employed an improper evidentiary standard in granting Queen's Medical Center's dismissal of the Petitioners' federal antitrust claims is legally irrelevant and immaterial because the Hawaii state courts never had, as a matter of law, subject matter jurisdiction over the Petitioners' federal antitrust claims.

For purposes of argument, even if the Petitioners could have lawfully brought their Sherman Act claims in the Hawaii state courts, this Court has held that summary disposition is not inappropriate in complex antitrust cases and the federal courts properly applying Rule 56 would not be reversed by this Court. Matsushita Electric Industrial Co. v. Zenith Radio, ___ U.S. ___ 106 S. Ct. 1348, 1355-57 (1986).

Thus, even if the Petitioners could have brought their federal antitrust claim in the Hawaii state courts, this Court would

have required the Petitioners to do more than simply show that there is some "metaphysical doubt" as to the material facts embodied in the First Amended Complaint. In the language of Rule 56, Fed. R. Civ. P., this Court observed that the non-moving party must come forward with:

> Specific facts showing that there is a genuine issue for trial...Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'.

Ibid, 106 S. Ct. 1356.

It would appear that the Petitioners' arguments with respect to the federal antitrust claim are therefore frivilous. First, the Petitioners could not, as a matter of law, have brought their federal Sherman Act claims against Queen's Medical Center in the state court because the federal courts have exclusive jurisdiction over such actions and the state court was without subject matter jurisdiction to hear

and determine any federal antitrust claims. Second, even if this Court reversed its long-standing rule of General Investment Co. v. Lake Shore and Michigan Southern Ry Co., supra, and held that a state court had concurrent jurisdiction with the federal courts to adjudicate federal treble-damage antitrust claims, a state court's order of dismissal or summary judgment, where the opposing party could do nothing more than show "some metaphysical doubt as to the material facts" and the non-moving party could not come forward with "specific facts showing that there is a genuine issue for trial" is consistent with the most recent rulings of this Court in reviewing summary dispositions in antitrust cases.

As to the Petitioners' state antitrust claims, which were the only valid antitrust claims before the Hawaii state courts, Queen's Medical Center submits that the Hawaii Supreme Court's standard for a

granting or denying a motion to dismiss is non-reviewable through this Court's appellate jurisdiction. This Court has no appellate jurisdiction to review a state supreme court's interpretation of a state's antitrust law, including the state court's standards for determining whether a motion to dismiss or summary judgment was appropriately granted.

Queen's Medical Center concludes that the Petitioners have not raised an appealable or reviewable issue of federal law because (1) under the latest rulings of this Court, there was no "state action" by Queen's Medical Center sufficient to allow the Petitioners to invoke the protections of the Fourteenth Amendment and 42 U.S.C. Section 1983, and (2) the Petitioners could not have brought their federal treble-damage antitrust action in the Hawaii state courts and the federal standards for granting or denying summary dispositions in the antitrust

context are legally immaterial and irrelevant.

C. The Issue of Exhaustion of Administrative Remedies is a Matter of State Law

In the case at bar, the Petitioners contend, inter alia, that they were not required to continue or exhaust their administrative remedies incorporated in the Queen's Medical Center's peer review process where (1) they were suing members of the Peer Review Committee in tort and contract; (2) the physician-applicant determines that continuing the peer review process would be futile; (3) the physician alleges a violation of 42 U.S.C. Section 1983; and (4) the peer review panel is "biased" against the applicant.

1. The Hawaii Supreme Court Properly Disposed Of The Petitioners' Claim That The Continuation With The Peer Review Process Would Be Futile

The Hawaii Supreme Court disposed of the Petitioners' argument that they were not required to exhaust their administrative remedies at Queen's Medical Center on independent and adequate state grounds. (Appendix B).

The Hawaii Supreme Court found that in the usual case a physician-applicant for staff privileges must exhaust available internal administrative remedies afforded by a hospital before abandoning the administrative process and initiating judical action. However, the Hawaii Supreme Court recognized two situations where the exhaustion of remedies requirement has been excused because (a) the administrative review process is either inadequate or (b) the

continuation would be futile and there was certainty of an adverse decision.

The Petitioners have not claimed that the Medical Center's three-step review process, including the Anesthesiology Credentials Committee, the Medical Executive Committee and Board of Directors, was inadequate or that the internal review and appellate procedure deprived the Petitioners or other applicants of their due process rights.

The Petitioners rely on the recognized line of cases which excuse the exhaustion requirement where the continuation of the process would be futile. While the Hawaii Supreme Court also recognized the Petitioners' existence of the doctrine of "futility", that court concluded that the Petitioners:

> failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's Medical Center had already prejudged Dr. Tun. Dr. Tun's personal inclination or views are

> insufficient grounds to support [Dr. Tun's] contentions.

(Appendix B-8)

As in any summary dismissal ruling, the trial court must determine if there are any material issues of fact that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. As this Court said in Anderson v. Liberty Lobby, Inc.:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 106 S.Ct. at 2512.

In the case at bar, the State Supreme Court found that the Petitioners failed to show "by any supporting evidence on the record specifically how or why such an appeal process would have been futile or how Queen's Medical Center had already prejudged Dr. Tun. Dr. Tun's personal inclination or

views are insufficient grounds to support [Dr. Tun's] contentions."

As to the Petitioner's right to abandon Queen's Medical Center's peer review process before its completion, the Hawaii Supreme Court found that the issues relating to the tort and contract claims should have been raised and argued before the Medical Executive Committee, the appellate forum for decisions of the Anesthesiology Credentials Committee and the Board of Directors, which reviews decisions of the Medical Executive Committee.

In the Hawaii Supreme Court, the Petitioners argued the issue of "futility" and their right to abandon the Queen's Medical Center's peer review process. That court disposed of the claims adversely to the Petitioners. Since there were independent nonfederal and adequate state grounds to dismiss the Petitioners' claim that they were not required to exhaust Queen's Medical

Center's administrative process before initiating legal action in the state court, this Court does not have appellate jurisdiction over the issue. No federal issue is raised by the state court's determination that the Petitioners failed to proffer sufficient evidence on the record to create a genuine issue of material fact that the continuation with the Queen's Medical Center's peer review process was futile.

The Petitioners refer the Court to Qasem v. Kozarek, 716 F.2d 1172 (7th Cir. 1983), for the proposition that the Petitioners were not required to exhaust their administrative remedies before initiating litigation against certain members of the Queen's Medical Center's Anesthesiology Credentials Committee for tort and contract damages.

Even assuming that the Hawaii state courts were compelled to follow Qasem v. Kozarek, Qasem v. Kozarek is clearly

distinguishable from the case at bar. The physician in Qasem v. Kozarek did not seek reinstatement of his hospital privileges, but exclusively pursued a claim for monetary damages. In the case at bar, the Petitioners have requested equitable relief seeking reinstatement and privileges, as well as money damages. In Qasem v. Kozarek, the physician terminated and abandoned any effort to seek privileges at the hospital and was in no way concerned with the outcome of the peer review process. Here, the Petitioners seek both reinstatement and monetary damages, relief which was precluded in Qasem v. Kozarek, 716 F.2d at 1175.

2. The Petitioners Neither Raised Nor Pressed The Issue That They Need Not Exhaust Administrative Remedies Before Filing a 42 U.S.C. Section 1983 Claim

The Petitioners cite this Court to Patsy v. Florida Board of Regents, 457 U.S.

496 (1982) for the proposition that Dr. Tun did not have to exhaust Queen's Medical Center's peer review process before filing their state court Complaint seeking recovery pursuant to 42 U.S.C. Section 1983. Even if we assume that the Petitioners had a valid 42 U.S.C. Section 1983 claim against Queen's Medical Center, the Petitioners never raised, briefed or argued the Patsy v. Florida Board of Regents issue in the Hawaii Supreme Court. In none of the proceedings in the state court did the Petitioners press or the court pass upon the contention that a 42 U.S.C. Section 1983 complainant need not exhaust its administrative remedies prior to commencing judicial action to vindicate their federal civil rights. Had the Petitioners raised the Patsy v. Florida Board of Regents doctrine in the state court system and the issue was decided adversely to Petitioners, then the Petitioners might have arguably been

able to raise that matter in this Petition for a Writ of Certiorari.

Queen's Medical Center contends that under Rendell-Baker v. Kohn, supra, Queen's Medical Center is not a "state instrumentality" and therefore is not subject to the Fourteenth Amendment. Absent any "state action", the Petitioners have no 42 U.S.C. Section 1983 claim against Queen's Medical Center. Had the Petitioners raised their 42 U.S.C. Section 1983 claim in the state courts and argued the effect of Patsy v. Florida Board of Regents on the peer review process, Queen's Medical Center would have had an opportunity to argue in the state courts the fact that Queen's Medical Center was not subject to the requirements of 42 U.S.C. Section 1983. Queen's Medical Center was deprived of advancing those arguments which preclude the filing of a 42 U.S.C. Section 1983 claim against Queen's Medical Center because the Patsy v. Florida Board of

Regents doctrine was never raised, briefed or decided in the courts below. As the case now stands, the Petitioners' failure to raise or press the Patsy v. Florida Board of Regents, doctrine in the Hawaii Supreme Court, or any lower court, deprives this Court of any appellate jurisdiction pursuant to Crowell v. Rendell, supra. The issue cannot now be raised by way of Certiorari in this Court.

3. There Was No Bias In The Queen's Medical Center Peer Review Process

The Petitioners also refer this Court to Gibson v. Berryhill, 411 U.S. 564 (1973) to support their contention that (1) the Anesthesiology Credentials Committee (2) the Medical Executive Committee and (3) the Board of Directors were fundamentally biased against the Petitioners and that any decision rendered by the Queen's Medical Center's peer review committees was constitutionally defective. The Petitioners' arguments are

unpersuasive on two grounds. First, the Petitioners never raised the Gibson v. Berryhill issue in the state courts. Second, unlike Gibson v. Berryhill, the Queen's Medical Center's review process contains adequate protections to guard against prejudice and protect the applicant from bias.

In Gibson v. Berryhill, supra, this Court found that salaried optometrists, not members of the state optometric association, who were charged with unprofessional conduct because of their employment by a corporation, were discriminated against by the state optometric board. This Court determined that the:

> aim of the [state optometric] Board was to revoke the licenses of all optometrists in the State who were employed by business corporations ...and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the

> Board's effort [to expel all optometrists employed by corporations] would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the [corporate optometrists].

Ibid at 578.

Based on Gibson v. Berryhill, the Petitioners herein claim that the peer review process at Queen's Medical Center was fundamentally flawed and biased because all of the participating physicians had a personal financial interest in excluding the Petitioners from practicing at Queen's Medical Center.

The Petitioners fail to acknowledge a critical distinction between Gibson v. Berryhill and the case at bar. In Gibson v. Berryhill, the single state optometric board was found constitutionally defective because the members of the board would have personally and financially benefited from the

mass expulsion of their actual or potential competitors. However, in the case at bar, Queen's Medical Center peer review process not only had an Anesthesiology Credential Committee composed of anesthesiologists who might have competed with the Petitioners, the review system also provided for a Medical Executive Committee composed of 27 voting members, drawn from all of the Queen's Medical Center's departments or services. Only 1 anesthesiologist serves on the Medical Examination Committee. The By-laws provide for the appeal of any decision of the Medical Executive Committee to the Board of Directors, which has 24 members and only 1 physician, the chief of staff. 3/ The Board

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3/ Had the Petitioners raised the Gibson v. Berryhill issue in the state court proceedings, Queen's Medical Center would have introduced the above-cited evidence as to the composition of the Medical Executive Committee and Board of Directors as of 1984, the relevant time period. The failure of the

of Directors is composed of lay persons, who have no personal or financial interest in the Petitioners' denial of staff privileges. Thus, in the case of Queen's Medical Center's peer review process, unlike Gibson v. Berryhill, there were not one, but three reviewing boards and two of the panels, the Medical Executive Committee except for the one anesthesiologist, and the Board of Directors, had no competitive involvement with the Petitioners or anesthesiology.

Again, the Respondents draw this Court's attention to the fact that in the state court proceedings, the Petitioners did

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3/ (cont'd)

Petitioners to raise the Gibson v. Berryhill issue in the state court substantially prejudices Queen's Medical Center because evidence was readily available to counter the Petitioners' Gibson v. Berryhill arguments of bias. (See Appendices I for the composition of the Queen's Medical Center Medical Executive Committee in 1984 and the Board of Directors in 1984, respectively.)

not raise nor press the Gibson v. Berryhill issue of the alleged constitutional defect and bias of the peer review process at Queen's Medical Center, even though this could have been briefed and argued in the state court proceedings.

4. The Anesthesiology Credentials Committee Did Not Engage in a Concerted Refusal to Deal

The Petitioners also refer this Court to Weiss v. York Hospital, 745 F.2d 786 (3rd Cir., 1984) for the proposition that the denial of privileges to Dr. Tun "was equivalent to a concerted refusal to deal with him, rendering their decisions and actions illegal per se under the Sherman Antitrust Act" (Petitioners' Writ of Certiorari, p. 54). Since this Court has long held that federal courts have the exclusive jurisdiction over Sherman Act cases, the Petitioner could not have brought

the federal antitrust action in the Hawaii state courts.

Again, assuming for purposes of argument, that the Petitioners properly plead a violation of Chapter 480, Haw. Rev. Stat., (state antitrust laws), the Hawaii Supreme Court's disposition of that state claim rests on an independent and adequate state grounds and is final as to any interpretation of the state antitrust law.

5. The Petitioners Failed to Establish a Genuine Issue of Material Fact on the Question of "Qualified Immunity

The Petitioners recognize that the opinions of Hawaii Supreme Court's have held that Section 663-1.7, Haw. Rev. Stat., grants a qualified privilege to peer review committee members and in any action involving the peer review process the plaintiff has the burden to adduce by clear and convincing proof that the defendant members of the peer

review committee were "motivated by malice and not by an otherwise proper purpose." (Appendix H, Section 663-1.7, Haw. Rev. Stat.). The By-laws of Kapiolani provide similar immunity, excluding acts done with malice and without good faith.

Based on the record, the Supreme Court found no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees.

In the Petitioners' Writ of Certiorari, at pages 60-61, the Petitioners note that the Hawaii Supreme Court did not specifically include within its decision on Section 663-1.7, Haw. Rev. Stat., that Queen's Medical Center or any of the individual respondents was immune from civil liability under Section 663-1.7, Haw. Rev. Stat., but only found Kapiolani and its named defendants were so immune. From this the Petitioners conclude that since Queen's

Medical Center was not specifically referred to in the state Supreme Court's Memorandum Opinion, the Petitioners now argue that the state Supreme Court found that "apparently Queen's Medical Center [was] not immune." (Appendix B-11 to B-13).

Petitioners' argument is patent nonsense. The Petitioners raised this point in their Motion for Reconsideration filed with the Hawaii Supreme Court (Petitioners' Writ of Certiorari, pp. 60-61). The argument was so utterly frivilous that the Hawaii Supreme Court denied the Petitioners' Motion for Reconsideration without argument. (Appendix C).

The Petitioners also raise certain issues with respect to the interpretation of Chapter 663-1.7, Haw. Rev. Stat. (Petitioners' Writ of Certiorari, pp. 57-64). None of these arguments raise a single federal issue reviewable by way of this Court's appellate jurisdiction. All of the

questions raised with respect to the peer review statute could have been argued to the Circuit Court and, on review, to the Hawaii Supreme Court. The Hawaii Supreme Court disposed of all of the issues properly raised and observed that the Petitioners did not raise "by clear and convincing evidence" the issues whether or not the Peer Review Committee members acted with malice and without good faith and hence had failed to state a claim upon which relief could be granted.

The explanation for the absence of any reference to Queen's Medical Center in the state Supreme Court's Memorandum Opinion dealing with Section 663-1.7, Haw. Rev. Stat., where only Dr. Hattori and Kapiolani were discussed, is that the Petitioners never properly alleged that any of Queen's Medical Center's personnel acted with malice or in bad faith. In fact, as the Hawaii Supreme Court found with respect to the Petitioners' challenge to the Queen's Medical Center's

peer review process, the only basis for these allegations were "Dr. Tun's personal inclination or views" which were found "insufficient grounds" to support the Petitioners' contentions. In short, the Petitioners' arguments with respect to Chapter 663-1.7, Haw. Rev. Stat., are made up out of whole cloth and are matters of state law which were raised and disposed of by the Hawaii Supreme Court. Many of the issues raised by Petitioners were decided by the Hawaii Supreme Court on independent and adequate state substantive and procedural grounds and are not reviewable by this Couret. The Petitioners have neither raised nor created any federal or constitutional issue with respect to the Hawaii Supreme Court's interpretation and disposition of the Chapter 663-1.7, Haw. Rev. Stat. allegations.

IV. CONCLUSION

Based on the above, the Queen's Medical Center and the individual Respondents

submit that this Court should deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

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October 31, 1986

86-573

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENTS, THE QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D., TO PETITION FOR WRIT OF CERTIORARI

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THAN TUN, M.D., ET AL. V. KAUIKEOLANI CHILDREN'S HOSPITAL, ET AL., MEMORANDUM OPINION, NO. 10564 (HAWAII SUPREME COURT) JUNE 17, 1986 (Appendix B). B-1

THAN TUN, M.D., ET AL. V. KAUIKEOLANI CHILDREN'S HOSPITAL, ET AL., ORDER, NO. 10564 (HAWAII SUPREME COURT) JULY 7, 1986 (Appendix C) C-1

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THAN TUN, M.D., ET AL. V. KAUIKEOLANI CHILDREN'S HOSPITAL, ET AL., JUDGMENT ON APPEAL, NO. 10564 (HAWAII SUPREME COURT) AUGUST 19, 1986 (Appendix D). D-1

THAN TUN, M.D., ET AL. V. KAPIOLANI CHILDREN'S MEDICAL CENTER, ET AL., CIVIL NO. 84-0886 (D.HAW.) STIPULATION OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION, DECEMBER 10, 1984 (Appendix E). E-1

UNITED STATES CODE, TITLE 42, SECTION 1983 (Appendix F) F-1

HAWAII RULES OF CIVIL PROCEDURE, RULE 56 (Appendix G) G-1

HAWAII REVISED STATUTES, SECTION 663-1.7 (Appendix H). H-1

MEDICAL EXECUTIVE COMMITTEE AND BOARD OF DIRECTORS - 1984 (Appendix I). I-1

APPENDIX A
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 84-0181

THAN TUN, M.D., and
THIDA SWE TUN,

Plaintiffs

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et.al.,

Defendants

ORDER GRANTING DEFENDANTS' QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D.,AND ARTHUR SPRAGUE, M.D.'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Queen's Medical Center, John Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D.'s Motion to Dismiss Complaint for Failure to State a Claim upon which Relief can be granted, having come on for hearing before the Honorable Frank T. Takao on November 13, 1984, and the Court having reviewed the pleadings and records on file

and the Memoranda and Affidavits submitted by counsel, and the Court having heard the arguments of Counsel, and the Court being fully advised in the premises, and the Court having found that:

1) The Queen's Medical Center Medical-Dental Staff Bylaws provide the procedure to be followed for the processing of a physician's application for staff membership and clinical privileges;

2) The Queen's Medical Center Medical-Dental Staff Bylaws provide an administrative remedy to be followed in the event a peer review committee recommends an adverse decision;

3) The Queen's Medical Center adhered to their Bylaws by providing timely notice and opportunity for hearing at each required level of the peer review process.

4) Plaintiff failed to exhaust the administrative remedies provided under these Bylaws before resorting to Court.

5) A physician applying for staff membership and clinical privileges must exhaust the administrative remedies provided under the hospital bylaws before resorting to judicial intervention.

IT IS HEREBY ORDERED that Plaintiffs' claim against Defendants Queen's Medical Center, Jon Pegg, M.D., Dan Yoshika, M.D. and Arthur Sprague, M.D. is dismissed for failure to exhaust the administrative remedies as provided under the Medical-Dental Staff Bylaws of Queen's Medical Center.

Pursuant to Hawaii Rules of Civil Procedure Rule 12(b)(6), Defendants' Motion to Dismiss shall be treated as one for summary judgment as provided in Hawaii Rules of Civil Procedure Rule 56 and the Plaintiffs' Complaint is hereby dismissed, with prejudice, as to Defendants' Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. The Court directs the clerk to enter judgment in

accordance with the Hawaii Rules of Civil Procedure Rule 58.

DATED: Honolulu, Hawaii, December 6, 1984.

/s/ Frank T. Takao
Judge of the Above-Entitled Court

APPROVED AS TO FORM:
(unsigned)
HAROLD GOBLE
Attorney for Plaintiffs

APPENDIX B
NO. 10564

IN THE SUPREME COURT

OF THE STATE OF HAWAII

THAN TUN, M.D., and
THIDA SWE TUN,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et.al.,

Defendants-Appellees.

and

THE QUEEN'S MEDICAL CENTER, et. al,

Defendants.

MEMORANDUM OPINION

Plaintiffs-appellants Dr. Than Tun and Thida Sew Tun appeal from a grant of summary judgment in favor of defendants-appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center (Kapiolani), Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Dr. Mitsuo Hattori, Queen's Medical Center,

Dr. John [sic] Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague. We affirm in part and reverse in part.

I.

Dr. Tun applied for anesthesiology privileges at Kapiolani. Initially, he was granted temporary privileges but those privileges were terminated based on Dr. Hattori's observations of Dr. Tun's performance in the operating room. Dr. Chung, Chief of Surgery, relied on Dr. Hattori's observations and recommended the termination to Mr. Davi, President. Dr. Hattori, Chief of Anesthesiology, had observed Dr. Tun on two occasions and believed his performance to be unsatisfactory. Dr. Tun, stating that he did not desire to use the facilities withdrew his application without pursuing the administrative appeal process as provided under the Medical Staff By-Laws. Kapiolani formally denied Dr. Tun's application, taking

the view that Dr. Tun's letter of withdrawal was a waiver of his right to an appeal hearing.

Subsequent to the denial of staff privileges to Dr. Tun by Kapiolani, Dr. Tun applied to Queen's Medical Center for anesthesiology privileges. on the application form, Dr. Tun answered "No" to the question of whether his privileges had ever been revoked, denied or suspended at any other hospital. Dr. Hattori, in responding to Queen's questionnaire, stated that, "I don't believe Dr. Tun is ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

Queen's Credentials Committee recommended that Dr. Tun's application for privileges be denied. The Medical Executive Committee affirmed the recommendation and notified Dr. Tun of the denial based on, inter alia, unethical conduct in answering

the question improperly. Dr. Tun was advised that he had a right to request an informal hearing before the Medical Executive Committee and a full hearing before the Board of Directors after the hearing and decision by the Medical Executive Committee. A hearing before the Medical Executive Committee was scheduled at the request of Dr. Tun but Dr. Tun failed to attend the hearing. Instead, Dr. Tun commenced action for damages in the circuit court.

Appellants sued Queen's, Kapiolani, and their respective doctors and administrators for monetary damages based on a multiple causes of action, summarized as follows: libel, slander and defamation; improper revocation of privileges; violation of due process; conspiracy to deny Dr. Tun his constitutional rights and to restrict interstate business; intentional infliction of emotional distress; malicious prosecution and abuse of process; breach and tortious

breach of contract; negligence; unfair and deceptive trade practices; loss of consortium; promissory estoppel; and intentional, malicious, wanton and willful acts of defendants. The trial court granted summary judgment in favor of defendants based on Dr. Tun's failure to exhaust the hospitals' administrative remedies. We affirm as to all defendants except Dr. Hattori.

II.

Appellants assert that Dr. Tun is excused from exhausting the available administrative remedies for the following reasons: (1) the administrative review would have been futile and would have caused undue hardship; (2) Dr. Tun was deprived of procedural due process; (3) appellants may sue the peer review committee for damages without exhausting the administrative remedies; and (4) the defendants acted with

malice against Dr. Tun under the Hawaii Revised Statutes (HRS) Section 663-1.7(b). 1/

III.

Was Dr. Tun bound to exhaust the administrative remedies available to him? And if so, would the pursuit of administrative appeals have been an act of futility or cause undue hardship?

It is generally accepted that a physician must exhaust available internal remedies afforded by the hospital before bringing a suit for damages. Westlake Community Hospital v. Superior Court of Los

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1/ The pertinent part of Section 663-1.7(b) reads:

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and
(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

Angeles County, 17 Ca. 3d. 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976); Eidelson v. Archer, 645 P.2d 171 (Alaska 1982). However, the exhaustion of remedies requirement has been excused where the administrative review process is either inadequate or would be futile to the certainty of an adverse decision. Eidelson, supra, at 181; see also Glendale City Employees' Ass'n v. City of Glendale, 15 Cal. 3d 328, 124 Cal. Rptr. 513, 540 P.2d 609 (1975).

Appellants contend that the available administrative appeal procedure would have been futile since Dr. Tun felt that Queen's had made a prejudgment, and that Queen's did not conduct a sufficient investigation prior to reducing his privileges. It was also apparent that Dr. Tun's and Queen's interpretation of the application differed. These contentions by appellants are issues which should have been raised and argued before the Medical Executive Committee and

ultimately before the Board of Directors if necessary. Moreover, appellants failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's had already prejudged Dr. Tun. Dr. Tun's personal inclination or views are insufficient grounds to support appellants' contentions.

As to Kapiolani, here again appellants fail to give any specific grounds as to why the administrative appeal process would have been futile or would have put Dr. Tun in undue hardship to pursue his administrative appeal. Instead, appellants asserted that since Dr. Tun withdrew his application, pursuing any administrative remedy was unnecessary. Yet, the record shows that Dr. Tun "withdrew his application" after notice of the termination of his temporary privileges. Therefore, any disagreement with Kapiolani should have been presented at a

hearing before an Ad Hoc Committee of the medical staff. Dr. Tun failed to avail himself of this hearing as provided by the By-Laws.

IV.

Was Dr. Tun denied his right to procedural due process?

The decision of a hospital board will be upheld unless the doctor involved was denied procedural due process of the hospital abused its discretion. Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972). Procedural due process requires that a doctor whose privileges are being revoked or who is being denied appointment or reappointment to the medical staff be given an opportunity to appeal the denial at a hearing. Further, the hearing must comport with certain procedural safeguards such as timely notice of hearing and a statement specifying the reasons for the initial decision of the hospital board. Silver at 485, 497 P.2d at 571.

Appellants claim that Dr. Tun was denied due process when Kapiolani terminated his temporary privileges without written charges or a proper hearing, but the record indicates that the notification by Kapiolani comported with the procedural due process requirements in Silver. Kapiolani notified Dr. Tun that the termination of his temporary privileges was due to two unacceptable anesthetic cases performed by him at the hospital and observed by Dr. Hattori. The notice informed Dr. Tun of his right to request a hearing within thirty days, and that failure to request a hearing would constitute a waiver of his right to do so.

Although Dr. Tun's privileges were actually terminated prior to hearing, the hospital took such action "in the best interest of patient care." We do not consider this an abuse of discretion by

Kapiolani whose physicians and supervisors were in the best position to make a decision for the benefit of their patients.

As to Queen's, appellants claim that Dr. Tun's privileges were denied on the basis of his application rather than his competency. This is a matter within the hospital's discretion. Further, the record shows that Queen's denied Dr. Tun's privileges due to serious questions regarding his ethical conduct. Queen's informed Dr. Tun that they concluded that he had falsified information and specified the grounds upon which they had based their conclusion. Queen's further informed Dr. Tun of his right to request a hearing with the Medical Executive Committee and the right to review his own staff file. We find no denial of due process or abuse of discretion here.

V.

Appellants contend that Kapiolani and its named defendants acted with malice.

Under HRS Section 663-1.7(b), Kapiolani and the members of its peer review committee are not liable for acts done in furtherance of the committee's purpose and without malice. This section confers a qualified privilege on the committee members, placing the burden on the plaintiff to adduce clear and convincing proof that the defendant was motivated by malice and not by an otherwise proper purpose. See Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970). The by-laws provide similar immunity, excepting acts done in malice and without good faith.

Appellants also contend that Kapiolani failed to investigate the accuracy of Dr. Hattori's report. The action of Kapiolani in relying on the Chief of Surgery's recommendation comports with procedure set down in the by-laws. The accuracy and truth of the report by Dr. Hattori were issues appropriate for an appeal hearing. At the hearing, Dr. Tun would have had the

opportunity to present evidence and witnesses in his favor.

Based on the record, we find no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees. We conclude that under HRS Section 663.7(b) [sic] Kapiolani and its named defendants are immune from the civil liabilities claimed by appellants.

VI.

Appellants further contend that Dr. Hattori was motivated by anger and acted with malice in writing a false report. Dr. Hattori is not a member of Kapiolani's peer review committee and therefore he does not fall under HRS Section 663-1.7(b). We, therefore, hold that the trial court committed error in granting summary judgment in favor of Dr. Hattori solely on the basis of appellants' failure to exhaust the administrative remedies available to them. We remand for proceedings anew on the causes

of action claimed by the appellants against Dr. Hattori.

VII.

Appellants' other claims are without merit.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawaii, June 17, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H., Wakatsuki

APPENDIX C
NO. 10564

IN THE SUPREME COURT

OF THE STATE OF HAWAII

THAN TUN, M.D., and
THIDA SWE TUN,

Plaintiffs-Appellants,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, et.al.,

Defendants-Appellees,

and

THE QUEEN'S MEDICAL CENTER, et. al,

Defendants.

ORDER

Defendant-appellee Hattori's motion for reconsideration filed on June 26, 1986, and Plaintiffs-appellants' motion for reconsideration filed on June 27, 1986, are hereby denied.

DATED: Honolulu, Hawaii, July 7, 1986.

/s/ Herman Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H., Wakatsuki

APPENDIX D
JUDGMENT ON APPEAL

NO. 10564

IN THE SUPREME COURT OF THE STATE OF HAWAII

THAN TUN, M.D., AND THIDA SWE TUN, Plaintiffs-Appellants, vs. KAUIKEOLANI CHILDREN'S HOSPITAL, A Hawaii non-profit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al., Defendants-Appellees, and THE QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et. al., Defendants.	CIVIL NO. 84-0181 APPEAL FROM THE: 1) ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT FILED MARCH 6, 1985, 2) JUDGMENT FILED MARCH 6, 1985, 3) AMENDED ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT FILED APRIL 2, 1985 and 4) AMENDED JUDGMENT FILED APRIL 2, 1985 FIRST CIRUCIT COURT THE HONORABLE EDWIN H.HONDA Judge

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Supreme Court of the State of Hawaii filed June 17, 1986, the judgments appealed from are affirmed as to Defendants-Appellees Kauikeolani Children's Hospital now known as Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walter Shim, Dr. Stanley Chung, Queen's Medical Center, Dr. John [sic] Pegg, Dr. Dan Yoshioka and Dr. Arthur Sprague, and reversed and remanded for further proceedings against Defendant-Appellee Dr. Mitsuo Hattori.

DATED: Honolulu, Hawaii, August 19, 1986.

BY THE COURT:
CLERK

APPROVED:
/S/ James H. Wakatsuki
JUSTICE

APPENDIX E

OF COUNSEL:
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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

THAN TUN, M.D., et al.,	CIVIL NO. 84-0886
Plaintiffs,	STIPULATION OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION
vs.	
KAPIOLANI CHILDREN'S MEDICAL CENTER, et al.,	
Defendants.	

STIPULATION OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties above, with the consent of the parties thereto, that the above entitled action is

hereby dismissed with prejudice on the court records.

This dismissal is pursuant to Rule 41(a)(2) Federal Rules of Civil Procedure on the grounds that there is no subject matter jurisdiction in the United States District Court for the action.

DATED: Honolulu, Hawaii, _____.

_____
HAROLD W. GOBLE
Attorney for Plaintiffs

EDMUND BURKE
JEFFREY T. ONO
Attorneys for
Defendant
MITSUO HATTORI, M.D.

RENE McWADE
Attorney for QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D. and ARTHUR SPRAGUE, M.D.

RONALD D. LIBKUMEN
Attorney for
Defendants
KAPIOLANI CHILDREN'S MEDICAL CENTER, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, RICHARD DAVI and PAUL E. COOK

APPROVED AND ORDERED:

JUDGE-U.S. DISTRICT COURT

THAN TUN, M.D., et al., vs. KAPIOLANI CHILDREN'S MEDICAL CENTER, et al., CIVIL NO. 84-0886

APPENDIX F

United States Code, Title 42, Section 1983:

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any of the rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P. L. 96-170. Section 1.93 Stat. 1284).

APPENDIX G
Hawaii Rules of Civil Procedure

Rule 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days

before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts

exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served

therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to

be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX H
HAWAII REVISED STATUTES Section 663-1.7
HAWAII REVISED STATUTES (1976 Replacement)

Section 663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, the membership of which comprises a majority of the people engaged in the profession or occupation in the area which it serves and a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the

persons engaged in its professional or occupation, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon any professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability for any professional society or hospital in communicating any conclusions

reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified

by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee. [L 1970, c 60 Section 1; am L 1975, c 170, Section 2; am L 1976, c 219, Section 18]

HAWAII REVISED STATUTES (1983 Supplement)

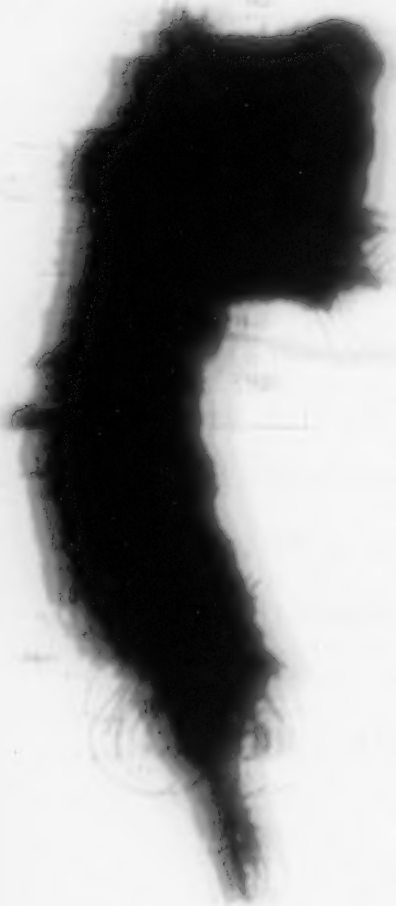
Section 663-1.7 Professional society; peer review committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the person engaged in its profession or occupation or specialty practice; and "peer review committee" or "committee" means a committee

created by a professional society, or by the medical or administrative staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or area of specialty practice, or in its hospital.

* * *

(d) The final peer review committee of a medical society, hospital, or other health care facility shall report in writing every adverse decision made by it to the department of commerce and consumer affairs. The report shall be filed within thirty business days following an adverse decision. The report shall contain information on the nature of the action, its date, the reasons for, and the circumstances surrounding the action; provided that specific patient identifiers shall be expunged. If a potential adverse decision was superseded by resignation or

other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state. The department shall prescribe forms for the submission of reports required by this section. Failure to comply with this subsection shall be a violation punishable by a fine of not less than $100 for each member of the committee. [am L 1982, c 227, Section 6; am L 1983, c 231, Section 1; am L 1984, c 168, Section 16]



APPENDIX I

MEDICAL EXECUTIVE COMMITTEE 1984

27 voting members.

Anesthesia	1
Cardiology	1
Dentistry	1
Emergency Medicine	1
Family Practice	1
General Surgery	1
Internal Medicine	2
Neurosg/Neurology	1
OB Gyn	1
Oncology	1
Opthalmology	1
Orthopedics	1
Otolaryngology (ENT)	1
Pathology	1
Pediatrics	1
Plastic Surgery	1

Psychiatry	1
Radiology	1
Trauma	1
Urology	1
Thoracic Cardiovascular Sg	1
Chief of Staff (internist)	1
Chief of Staff-Elect (urologist)	1

1984
Queen's Medical Center
Board of Directors

Board of Directors

24 members *

* 1 M.D. - Chief of Staff (internist)

1 M.D. - Chief of Staff-Elect (urologist)(ex-officio)